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2001–2005
Including Recent Points

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Self-employed bankrupt's retirement annuity contract forming part of estate on bankruptcy — Bankruptcy order made and trustee in bankruptcy appointed before human rights legislation in force — Bankrupt following discharge applying to prevent trustee using pension benefits to pay creditors — Whether discrimination in enjoyment of possessions compared with employee with occupational pension forfeiting on bankruptcy — Insolvency Act 1986, ss 283(1), 436 — Human Rights Act 1998, Sch 1, Pt 1, art 14, Pt II, art 1 **In re Malcolm,** CA [2005] ICR 611

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Complaint to Office of Fair Trading — Office of Fair Trading believing merger not expected to result in substantial lessening of competition and declining to refer to Commission — Competition Appeal Tribunal formulating test requiring Office of Fair Trading to be further satisfied no significant prospect of alternative view being taken by Commission — Whether correct test — Whether appeal tribunal properly applying principles of judicial review — Enterprise Act 2002, ss 33(1), 120(4) **IBA Healthcare Ltd v Office of Fair Trading,** CA [2004] ICR 1364

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Dealers contracting with manufacturer to comply with its instructions — Price-fixing calls by manufacturer not acceded to by dealers — Whether dealers deemed to have accepted in advance unlawful variations of contract — Whether anti-competitive agreement by virtue of dealers' acquiescence — EC Treaty, art 81(1) EC **Volkswagen AG v Commission of the European Communities (Case T-208/01),** CFI [2004] ICR 1197

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Embassy employee's complaint of unfair dismissal — Notice of appearance entered by solicitors on behalf of embassy — Embassy claiming state immunity — Duty of Employment Appeal Tribunal — Whether appeal tribunal right to accept evidence notice of appearance not authorised by head of mission — Whether head of mission having power to delegate authority to submit to jurisdiction — State Immunity Act 1978, s 2(3)(7) **Republic of Yemen v Aziz,** CA [2005] ICR 1391

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DISCRIMINATION

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Organisation of workers

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Partnership

Partnership of two doctors — Complaint of sex discrimination by one against the other — Whether respondent partner "a firm" — Whether tribunal having jurisdiction to hear complaint — Partnership Act 1890, s 5 — Sex Discrimination Act 1975, s 11(1) (as amended by Sex Discrimination Act 1986, s 1(3)) **Dave v Robinska** , EAT [2003] ICR 1248

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Damages—*continued*

Compensation—continued

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Disabled person

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Murray v Newham Citizens Advice Bureau Ltd (No 2), EAT [2003] ICR 643

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Cruickshank v VAW Motorcast Ltd, EAT [2002] ICR 729

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Claimant suffering from learning difficulties — Whether "mental impairment" — Whether evidence of educational psychologist sufficient — Disability Discrimination Act 1995, s 1(1), Sch 1, para 1(1) **Dunham v Ashford Windows Ltd,** EAT [2005] ICR 1584

Medical notes indicating applicant suffering from stress and depression — No informed medical diagnosis — Whether mental impairment established — Disability Discrimination Act 1995, s 1(1), Sch 1, para 1 **Morgan v Staffordshire University,** EAT [2002] ICR 475

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McNicol v Balfour Beatty Rail Maintenance Ltd, CA [2002] ICR 1498

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Disability—*continued*

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Treatment

Employee suffering damage to hearing and post-traumatic stress — Inability to travel by plane or underground — Whether substantial adverse effect on ability to carry out normal day-to-day activities — Whether effect of treatment to be taken into account — Whether employee disabled — Tribunal's approach to medical evidence — Disability Discrimination Act 1995, s 1, Sch 1, paras 4(1), 6(1) **Abadeh v British Telecommunications plc,** EAT [2001] ICR 156

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Employment

Arrangements for applicants

Volunteer adviser training programme — Whether "arrangements . . . for the purpose of determining to whom to offer employment" — Agreement between advice bureau and trainee volunteer adviser — Whether contract personally to do any work — Disability Discrimination Act 1995, ss 4(1)(a),68(1) **Murray v Newham Citizens Advice Bureau,** EAT [2001] ICR 708

Constructive dismissal

Employee faced with possibility of redundancy resigning through ill-health — Whether dismissed — Whether constructive dismissal within meaning of "dismissing" — Disability Discrimination Act 1995, s 4(2)(d) **Catherall v Michelin Tyres plc,** EAT [2003] ICR 28

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Discriminatory act

Employee resigning following demotion — Whether employer discriminating "by dismissing" her — Disability Discrimination Act 1995, s 4(2)(d), Sch 3, para 3(1) **Comr of Police of the Metropolis v Harley,** EAT [2001] ICR 927

Duty to make adjustments

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Employer refusing to consider employee's harassment complaint while disciplinary proceedings against her pending — Whether failure to make reasonable adjustment — Whether employers' ignorance of duty precluding justification — Disability Discrimination Act 1995, ss 5, 6 **Johnson & Johnson Medical Ltd v Filmer,** EAT [2002] ICR 292

Excluded classes

Advice bureau staffed by paid workers and volunteers — Whether volunteers "employees" for purposes of small business exemption — Disability Discrimination Act 1995, ss 7(1) (as substituted by Disability Discrimination (Exemption for Small Employers) Order 1998, art 2), 68(1) **South East Sheffield Citizens Advice Bureau v Grayson,** EAT [2004] ICR 1138

Occupational health consultant recommending relocation of employee suffering from depression — Recommendation not acted on — Employee subsequently disciplined and dismissed — Whether failure to make reasonable adjustments — Whether justification in issue — Disability Discrimination Act 1995, ss 5(2), 6 **Prison Service v Beart,** CA [2003] ICR 1068

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Disability—*continued*
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Former employee

Complaints of discrimination and victimisation based on events after termination of employment — Whether jurisdiction to consider complaints — Disability Discrimination Act 1995, s 4(2) **Jones v 3M Healthcare Ltd,** EAT [2002] ICR 341
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HL(E) [2003] ICR 867

Dismissal for ill-health upheld on internal appeal — Complaint of failure to make reasonable adjustments including employers' rejection of claimant's post-dismissal request to revoke dismissal — Whether "act extending over a period" — Whether jurisdiction to consider post-dismissal claim — Complaint 2 days out of time due to secretarial oversight — Whether just and equitable to extend time — Disability Discrimination Act 1995, s 6(1), Sch 3, para 3
Baynton v South West Trains Ltd, EAT [2005] ICR 1730

Less favourable treatment: see also EDUCATION: **Teacher:** *Discrimination*

Employee suffering from chronic anxiety — Dismissed because of inability to work with new assistant — Whether discrimination for reason relating to disability — Whether provision of assistant "arrangement" made by employer — Need for tribunal to carry out analysis of employee's disability in work context — Disability Discrimination Act 1995, ss 5, 6
Edwards v Mid-Suffolk District Council, CA [2001] ICR 616

Employee suffering from depressive illness — Dismissed for misconduct following disciplinary proceedings held in absence on sick leave — Tribunal finding failure to make reasonable adjustments in relation to disciplinary proceedings — Whether also less favourable treatment — Tribunal finding employers' reasons for dismissal unjustified but unrelated to disability — Whether inference of discrimination to be drawn — Disability Discrimination Act 1995, s 5(1) **Rowden v Dutton Gregory,** EAT [2002] ICR 971

Justification of treatment — Diabetic becoming insulin-dependent withdrawn from driving duties — Employer later revising policy and offering restricted driving duties — Whether open to employment tribunal to review employer's assessment of risk — Disability Discrimination Act 1995, s 5(3) **Post Office v Jones,** CA [2001] ICR 805

School
Less favourable treatment

Pupil suffering from autistic disorder excluded from school for bad behaviour — Whether proper comparator child neither disabled nor badly behaved — Disability Discrimination Act 1995, s 28B (as inserted by Special Educational Needs and Disability Act 2001, s 12)
McAuley Catholic High School v C, Silber J [2004] ICR 1563

Employment
Authorisation or qualification

Applicant refused entry to grade of specialist registrar on ground post held not meeting approval criteria of regulatory committee — Whether continuing discriminatory act — Separate complaints in different tribunals against same parties raising similar claims — Whether abuse of process — Refusal by specialist training authority to enter applicant on specialist register — Appeal panel of authority dismissing appeal — Whether act complained of that of authority or appeal panel — Whether jurisdiction in employment tribunal to hear complaint — Race Relations Act 1976, ss 12, 54(2), 68(7) — European Specialist Medical Qualifications Order 1995, art 12 (as amended by European Specialist Medical Qualifications Amendment Regulations 1997, para 2(4)) **Chaudhary v Royal College of Surgeons,** CA [2003] ICR 1510

Applicant seeking election to Scottish Parliament on job-share basis — Complaint of sex discrimination — Whether employment tribunal having jurisdiction — Sex Discrimination Act 1975, s 13(1) **Secretary of State for Scotland v Mann,** EAT(Sc) [2001] ICR 1005

Applicants suspended from standing for or representing Labour Party in local elections — Whether Labour Party "body" able to confer "authorisation" needed for "engagement in a particular profession" — Whether local councillor engaged in profession — Whether employment tribunal having jurisdiction to entertain complaint — Whether members of Labour Party "section of the public" — Race Relations Act 1976, ss 12, 20(1), 25
Ali v McDonagh, CA [2002] ICR 1026

Refusal by specialist training authority to enter applicant on specialist register — Appeal panel of authority dismissing appeal — Applicant complaining dismissal discriminatory — Whether jurisdiction to hear complaint in absence of appeal from appeal panel — Whether effective remedy provided — Race Relations Act 1976, ss 12, 54(2) — Human Rights Act 1998, Sch 1, Pt 1, art 6 — European Specialist Medical Qualifications Order 1995, art 13
Chaudhary v Specialist Training Authority Appeal Panel (No 2), CA [2005] ICR 1086

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  Employment—*continued*
    Authorisation or qualification—continued
      Sole principal solicitor seeking legal aid franchise for her firm from Legal Services Commission — Whether applicant for "employment" — Whether franchise "facilitates engagement in . . . profession" — Race Relations Act 1976, ss 4, 12, 78(1)
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    Burden of proof
      Burden on claimant to establish facts capable of constituting unlawful discrimination — Burden shifting to employer to prove absence of discrimination — Proper approach — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 5) — Race Relations Act 1976, s 54A (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 41)
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    Contract for services
      Self-employed taxi driver paying weekly fee to operators for access to customers — Whether contract "personally to execute any work or labour" — Race Relations Act 1976, s 78(1)
        Mingeley v Pennock (trading as Amber Cars), CA [2004] ICR 727

    Contract of employment
      Illegality
        Asylum-seeker obtaining employment in breach of condition of leave to remain — Whether illegality precluding race discrimination complaint against employer — Race Relations Act 1976, s 4(2)(b)(c) **Governing Body of Addey and Stanhope School v Vakante,** EAT [2003] ICR 290

        Asylum-seeker obtaining employment in breach of condition of leave to remain — Whether illegality precluding race discrimination complaint against employer — Race Relations Act 1976, s 4(2)(b)(c) — Council Directive 2000/43/EC, art 7
          Vakante v Governing Body of Addey and Stanhope School (No 2), EAT [2004] ICR 279
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    Contract worker see **Sex:** *Employment:* Requirement or condition
      EMPLOYMENT: **Contract of employment:** *General practitioner*

    Dismissed employee
      Applicant complaining after dismissal of sexual harassment during employment — Employer rejecting complaint — Whether jurisdiction to hear complaint of discrimination in relation to employer's investigation of sexual harassment claim — Sex Discrimination Act 1975, s 6(2) — Council Directive 76/207/EEC, art 6 **Rhys-Harper v Relaxion Group plc,**
        CA [2001] ICR 1176
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    Establishment in Great Britain
      Member of armed forces stationed abroad complaining of racial discrimination — Whether working "wholly or mainly outside Great Britain" — Whether applicant's "employment . . . at an establishment outside Great Britain" — Race Relations Act 1976, ss 4(1), 8(1)
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    Former employee
      Complaints of discrimination relating to events after termination of employment — Whether jurisdiction to consider complaints — Sex Discrimination Act 1975, s 6(2) — Race Relations Act 1976, s 4(1)(2) — Disability Discrimination Act 1995, s 4(2)
        Rhys-Harper v Relaxion Group plc, HL(E) [2003] ICR 867
        D'Souza v Lambeth London Borough Council, HL(E) [2003] ICR 867
        Jones v 3M Healthcare Ltd, HL(E) [2003] ICR 867

      Complaint of victimisation on ground of sex — Applicant complaining termination of new employment due to unsolicited detrimental statement by former employer — Whether jurisdiction to consider complaint — Sex Discrimination Act 1975, s 6(2)
        Metropolitan Police Service v Shoebridge, EAT [2004] ICR 1690

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Employment—*continued*

Liability of employers and principals

Police — Chief officer appointing investigating and supervisory officers in disciplinary proceedings — Police officers complaining of discrimination by such officers — Whether chief officer liable — Whether delay rendering employment tribunal decision unsafe — Sex Discrimination Act 1975, s 41(2) — Race Relations Act 1976, s 32(2) — Police (Discipline) Regulations 1985, reg 6 — Police (Conduct) Regulations 1999, reg 8
Yearwood v Comr of Police of the Metropolis, EAT [2004] ICR 1660

Evidence

Discriminatory act

Complaint of campaign of racial discrimination by superior detailed in originating application — Hearing limited to incidents within three months of originating application — No evidence given of acts referred to in originating application within period — Whether jurisdiction to consider evidence of acts not referred to in originating application — Race Relations Act 1976, s 54 **Ahuja v Inghams (Accountants),** CA [2002] ICR 1485

Onus of proof

Complaint of discrimination on grounds of race in relation to promotion — Piecemeal approach to evidence adopted by tribunal diminishing cumulative effect of primary facts — Whether decision flawed **Qureshi v Victoria University of Manchester (Note),** EAT [2001] ICR 863

Two equally qualified candidates for research post — Whether panel's choice affected by racial bias — Need to look for indicators apart from selection interview — Tribunal failing to record findings on relevant issues of fact — Whether decision flawed **Anya v University of Oxford,** CA [2001] ICR 847

Fixed-term employee

Less favourable treatment

Employment terminating by non-renewal after series of short fixed-term contracts — Whether capable of constituting less favourable treatment — Whether detriment — Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, reg 3(1)
Webley v Departtment for Work and Pensions, CA [2005] ICR 577

Time limit

Payment of bonus limited to permanent employees — Announcement of bonus preceding prohibition on discrimination against fixed-term employees — Details of conditions for payment and payment after prohibition coming into force — When time starting to run — Whether less favourable treatment "on ground employee fixed-term employee" — Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regs 3(3)(a), 7(2)(a)(3)(a) **Coutts & Co plc v Cure,** EAT [2005] ICR 1098

Race

Aiding unlawful acts

Gipsies booking council premises for wedding reception — Police providing inaccurate information about family to council — Council racially discriminating by imposing additional conditions on booking — Whether police knowingly aiding discrimination — Race Relations Act 1976, s 33(1) **Hallam v Avery,** HL(E) [2001] ICR 408

Assessors, role of

University student complaining of racial discrimination by supervisor — County court claim heard by judge and assessors — Whether assessors to assist judge in evaluating evidence — Whether having role in decision making process — Whether assessors' advice to be disclosed to parties prior to judgment — Whether to be recorded in judgment — Race Relations Act 1976, s 67(4) **Ahmed v Governing Body of the University of Oxford,** CA [2003] ICR 733

Student union officers expelled by university and excluded from premises — Student union treating employment contracts as ended — Whether university knowingly aiding dismissals — Race Relations Act 1976, s 33(1) **Anyanwu v South Bank Student Union (Commission for Racial Equality intervening),** HL(E) [2001] ICR 391

Employment

Applicant for employment

Trainee doctor seeking hospital placement under Secretary of State's scheme — Placements made by dean in consultation with specialist training committee — Appointed doctors employed by hospital trust — Employees of trust sitting on committee recommending applicant's placement at another hospital — Whether trust making "arrangements" for purpose of determining offer of employment — Whether trust refusing to offer employment — Race Relations Act 1976, ss 4(1), 13 (as substituted by Employment Act 1989, s 7(2))
Hussain v King's College Hospital NHS Trust, CA [2002] ICR 1433

DISCRIMINATION—*continued*
Race—*continued*
Employment—continued
Discriminatory act

Employee resigning following continuing racial abuse by foreman — Whether employer discriminating against employee by "dismissing" him — Whether "act extending over a period" — Award for injury to feelings — Injury varying in gravity at different times — Whether interest on award to run from start of discrimination — Race Relations Act 1976, ss 4(2)(c), 68(1)(7)(b) — Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, reg 6(1)(a)(3) **Derby Fabrication Ltd v Burton,** EAT [2001] ICR 833

Harassment of employee

Applicant retaliating after racial attack by fellow employee on day out organised by employer — Whether "in the course of his employment" — Whether employer liable for attack by fellow employee — Employer's policy to dismiss employees using abusive language without regard to mitigating factors — Applicant dismissed under policy — Whether direct discrimination by employer — Race Relations Act 1976, ss 1(1)(a), 32(1)
Sidhu v Aerospace Composite Technology Ltd, CA [2001] ICR 167

Less favourable treatment *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Striking out proceedings*

Dismissal of British employees for redundancy — Whether Japanese secondees from parent company under contracts precluding dismissal valid comparators — Whether indirect discrimination — Race Relations Act 1976, ss 1(1)(a)(b), 3(4)
Hanly v Norinchukin International plc, EAT [2003] ICR 1416

Police

Constable complaining of racial abuse by fellow constables — Whether chief constable liable — Race Relations Act 1976, ss 16(1), 32(1), 75
Chief Constable of Bedfordshire Police v Liversidge, CA [2002] ICR 1135

Requirement or condition *see also* **Sex:** *Employment:* Requirement or condition

Employee working for foreign government at school in England — Foreign employees at school receiving substantial relocation allowance not available to UK employees — Employer precluded from pleading justification — Whether employee suffering detriment — Whether "relevant circumstances" same for UK and foreign employees — Race Relations Act 1976, ss 1(1)(b), 3(4) **Spicer v Government of Spain,** CA [2005] ICR 213

Sex
Burden of proof

Burden on complainant to establish facts capable of constituting unlawful discrimination — Burden shifting to employer to prove treatment in no sense on ground of sex — Inferences to be drawn from employer's disregard of code of practice or questionnaire — Whether relevant to equal pay claim — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983 (SI 1983/1794), reg 2(2)) — Sex Discrimination Act 1975 (as amended by Race Relations Act 1976, Sch 4, para 1 and Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, ss 1(2), 56A(10), 63A, 74(2)
Barton v Investec Henderson Crosthwaite Securities Ltd, EAT [2003] ICR 1205

Burden on complainant to establish prima facie case of less favourable treatment on ground of sex — Burden to show treatment not on ground of sex shifting to respondent once prima facie case established — Sex Discrimination Act 1975, ss 1(1), 63A(2) (as substituted and inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, regs 3, 5)
University of Huddersfield v Wolff, EAT [2004] ICR 828

Employee dismissed because of rumours of relationship with senior colleague — Tribunal finding employers failing to discharge burden of proving treatment "in no sense whatsoever" on ground of sex — Whether correct test — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 5)
Chamberlin v Emokpae, EAT [2004] ICR 1476

Employment
Compensation

Contract of employment tainted by illegality — Whether employee precluded from claiming compensation for loss of earnings — Sex Discrimination Act 1975, ss (1), 66(1) — Council Directive 76/207/EEC, art 6, art 6 **Hall v Woolston Hall Leisure Ltd,** CA [2001] ICR 99

DISCRIMINATION—*continued*
Sex—*continued*
Employment—continued
Genuine occupational qualification

Transsexual rejected for appointment as police constable on ground of inability to carry out personal searches — Whether exception applicable — Whether constable "liable to be called upon to perform" intimate searches — Whether supplementary genuine occupational qualification — Sex Discrimination Act 1975, ss 7, 7B(2)(a) (as inserted by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 4(1)) — Police and Criminal Evidence Act 1984, s 54(9)
Chief Constable of the West Yorkshire Police v A (No 2), EAT [2002] ICR 552
CA [2003] ICR 161
HL(E) [2004] ICR 806

Less favourable treatment *see also* Industrial Relations: **Employment tribunals:** *Striking out proceedings*
Trade union activities: *Action short of dismissal*

Applicant discharged from armed forces on ground of homosexuality — Complaint of discrimination on ground of sex — Whether "sex" including sexual orientation — Appropriate comparator — Sex Discrimination Act 1975, ss 1(1)(a), 5(3) — Human Rights Act 1998, s 3, Sch 1, Pt I, art 14 **Macdonald v Ministry of Defence,**
EAT(Sc) [2001] ICR 1
Ct of Sess [2002] ICR 174
HL(Sc) [2003] ICR 937

Employee undergoing gender reassignment to female sex seeking use of female toilet — Employer arranging use of toilet for disabled persons while applicant at pre-operative stage — Whether unlawful discrimination — Allegation of harassment by fellow employees — Whether employer liable — Sex Discrimination Act 1975, ss 2A, 41(3), 82 (as inserted and amended by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 2(1)(3))
Croft v Royal Mail Group plc (formerly Consignia plc), CA [2003] ICR 1425

Female chief inspector stopped from doing staff appraisals following complaints — Male chief inspectors retaining function — Whether valid comparators — Whether "detriment" — Approach to question of less favourable treatment on ground of sex — Sex Discrimination (Northern Ireland) Order 1976, arts 3(1)(a), 7, 8(2)(b)
Shamoon v Chief Constable of the Royal Ulster Constabulary, HL(NI) [2003] ICR 337

Gender reassignment treatment affecting applicant's work performance — Dismissal for capability — Whether less favourable treatment — Gender identity dysphoria — Whether affecting day-to-day activities — Whether disability — Sex Discrimination Act 1975, s 1(1) — Disability Discrimination Act 1995, s 1(1)
Ashton v Chief Constable of West Mercia Constabulary, EAT [2001] ICR 67

Lesbian teacher complaining of pupils' gender-specific abuse — No evidence hypothetical homosexual male would have been treated differently — Whether sex discrimination — Sex Discrimination Act 1975, ss 1(1), 5(3) — Human Rights Act 1998, s 3(1)
Pearce v Governing Body of Mayfield Secondary School, CA [2002] ICR 198
HL(E) [2003] ICR 937

Maternity leave

Bonus based on sales reducing pro-rata where employee absent from work — Whether discriminatory where absence due to maternity leave — Whether bonus "wages or salary" — Sex Discrimination Act 1975, s 6(2)(6) — Employment Rights Act 1996, ss 47C, 71(5)(6) (as inserted and substituted by Employment Relations Act 1999, Sch 4, Pt III, para 8, Pt I) — Maternity and Parental Leave etc Regulations 1999, reg 9(2)(3) (as substituted by Maternity and Parental Leave (Amendment) Regulations 2002, regs 3, 9) **Hoyland v Asda Stores Ltd,**
EAT(Sc) [2005] ICR 1235

Police

Constable complaining of less favourable treatment and victimisation in decisions by superiors as to postings — Whether "act done by" chief officer — Whether chief officer liable for discrimination — Sex Discrimination Act 1975, s 17(1)
Chief Constable of Cumbria v McGlennon, EAT [2002] ICR 1156

Constable complaining of sex discrimination by fellow officers — Whether chief constable liable — Sex Discrimination Act 1975, ss 17(1), 41(2) — Council Directive 76/207/EEC, art 1(1) **Chief Constable of Kent County Constabulary v Baskerville,** CA [2003] ICR 1463

DISCRIMINATION—*continued*

Sex—*continued*

Employment—continued

Pregnancy

Employee recruited for fixed period failing to inform employer of pregnancy — Dismissal during term of contract when employer informed of pregnancy — Whether contrary to Community law — Whether non-renewal of fixed-term contract dismissal — Whether contrary to Community law in case of pregnant employee — Council Directive 76/207/EEC, arts 2(1), 3(1), 5(1) — Council Directive 92/85/EEC, art 10
Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK) (acting on behalf of Brandt-Nielsen) (Case C-109/00), ECJ [2004] ICR 610
Jiménez Melgar v Ayuntamiento de los Barrios (Case C-438/99), ECJ [2004] ICR 610

Vacancy for work in operating theatre for indefinite period — Pregnant woman rejected on ground of national law prohibiting employment of pregnant women in potentially dangerous work — Whether unlawful discrimination — Council Directive 76/207/EEC, art 2
Mahlburg v Land Mecklenburg-Vorpommern (Case C-207/98), ECJ [2001] ICR 1032

Provision, criterion or practice

Employers not permitting employee to work part-time on return from maternity leave — Employee dismissed on ground of redundancy — Whether objectively justified — Sex Discrimination Act 1975, s 1(2)(b)(ii) (as substituted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 3)
Hardy & Hansons plc v Lax, CA [2005] ICR 1565

Requirement or condition

College requiring predominantly female part-time lecturers on fixed-term contracts to be re-engaged as sub-contractors through agency — Applicant losing income and benefits associated with employment — Proper approach to evaluating justification for condition against discriminatory effect on women — Whether discrimination against applicant as contract worker — Whether lecturer employed by college appropriate comparator in equal pay claim — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1) — Sex Discrimination Act 1975, ss 1(1)(b), 9(2) — EC Treaty, art 141
Allonby v Accrington and Rossendale College, CA [2001] ICR 1189

Employee over 65 at time of dismissal — Application for redundancy payment and complaint of unfair dismissal precluded by domestic legislation — Whether legislation discriminating against men — Onus to show objectively justified — Employment Rights Act 1996, ss 109(1), 156(1) — EC Treaty, art 141 **Harvest Town Circle Ltd v Rutherford**, EAT [2002] ICR 123

Employee over 65 at time of dismissal — Application for redundancy payment and complaint of unfair dismissal precluded by domestic legislation — Whether legislation discriminating against men — Whether objectively justified — Employment Rights Act 1996, ss 109(1)(b), 156(1)(b) — EC Treaty, art 141 — Council Directive 97/80/EC, art 2
Secretary of State for Trade and Industry v Rutherford (No 2), EAT and CA [2005] ICR 119

Employee working under series of fixed term contracts — Employers' need for redundancies — Policy of non renewal of fixed term contracts before applying redundancy selection procedure — Whether indirect discrimination — Whether requirement shown to be justified — Sex Discrimination Act 1975, s 1(1)(b) **Whiffen v Milham Ford Girls' School**, CA [2001] ICR 1023

Equally qualified man and woman applying for promotion — Priority given to woman where under-represented unless balance tilted in favour of man by reasons specific to him — Whether contrary to equal treatment principle — Whether within exception for measures to promote equal opportunity — Council Directive 76/207/EEC) art 2(1)(4)
Marschall v Land Nordrhein-Westfalen (Case C-409/95), ECJ [2001] ICR 45

Lord Chancellor appointing special adviser — Post not advertised and applications not sought — Whether indirect discrimination — Sex Discrimination Act 1975, s 1(1)(a) — Race Relations Act 1976, s 1(1)(b) **Lord Chancellor v Coker**, EAT [2001] ICR 507
CA [2002] ICR 321

Positive discrimination in favour of under-represented sex — Candidate belonging to under-represented sex to be selected for post unless breach of requirement of objectivity — Whether contrary to Community law — EC Treaty, art 141 EC — Council Directive 76/207/EEC, art 2(1)(4) **Abrahamsson v Fogelqvist** (Case C-407/98), ECJ [2002] ICR 932

DISCRIMINATION—*continued*
Sex—*continued*
Employment—continued
Requirement or condition—*continued*

Treatment on ground of applicant's homosexuality — Complaint of discrimination on ground of sex — Whether sex including sexual orientation — Appropriate comparator — Sex Discrimination Act 1975, ss 1(1)(a), 5(3)
Macdonald v Ministry of Defence, HL(Sc) [2003] ICR 937
Pearce v Governing Body of Mayfield Secondary School, HL(E) [2003] ICR 937

Equal pay see also *Burden of proof*
Employment: Requirement or condition

Comparison of pay

Midwives receiving lower basic monthly salary than clinical technicians — Inconvenient hours supplement paid to midwives but not technicians — Midwives working fewer weekly hours than technicians — Whether pay comparison to take account of supplement and reduced hours — EC Treaty, art 119 — Council Directive 75/117/EEC
Jämställdhetsombudsmannen v Örebro Läns Landsting (Case C-236/98), ECJ [2001] ICR 249

Damages

Claims for non-economic loss — Whether recoverable — Employees changing jobs with same employer over 6 months before complaints — Whether "stable employment" relationship — Whether change in "employment" for purposes of qualifying date — Equal Pay Act 1970, ss 2(1)(4) (as substituted by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt 1, para 2), 2ZA(2)(3) (as inserted by Equal Pay Act 1970 (Amendment) Regulations 2003, reg 4) — Sex Discrimination Act 1975, s 6(6) **Newcastle upon Tyne City Council v Allan**, EAT [2005] ICR 1170

Indirect discrimination

Comparators better paid than claimants — Sexes equally represented in claimants' group — Statistics based on pool of employees in claimants' and comparators' groups showing women much more likely to be disadvantaged group — Whether establishing prima facie case of indirect discrimination — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1) and Equal Pay (Amendment) Regulations 1983, reg 2(2))
Home Office v Bailey, CA [2005] ICR 1057

Maternity leave

Lump sum payment to employees on maternity leave to compensate for occupational disadvantages of maternity leave — Whether payment to female employees only discriminatory — EC Treaty, art 119
Abdoulaye v Régie Nationale des Usines Renault SA (Case C-218/98), ECJ [2001] ICR 527

Maternity pay based on earnings during specified period — Pay rise awarded after specified period — Whether contrary to Community equal pay principle to exclude pay rise in calculating maternity pay — Whether domestic legislation providing effective remedy — Equal Pay Act 1970, s 1(1)(2) (as amended by Sex Discrimination Act 1975, s 8) — Employment Rights Act 1996, s 13 — Statutory Maternity Pay (General) Regulations 1986, reg 21(7) (as inserted by Statutory Maternity (General) Amendment Regulations 1996, reg 2) — EC Treaty, art 119 **Alabaster v Barclays Bank plc (formerly Woolwich plc)**, CA [2005] ICR 1246

Maternity pay based on earnings during specified period — Whether earnings to include pay rise awarded after specified period — Whether relevant that pay rise not backdated — EC Treaty, art 119 **Alabaster v Woolwich plc (Case C-147/02)**, ECJ [2005] ICR 695

Pension scheme

Female nurses retiring at 55 entitled to pension calculated on full pensionable service — Calculation of male nurses' pensions restricted to service after May 1990 — Whether restriction discriminatory — National Health Service Pension Scheme Regulations 1995, reg R2(4) — EC Treaty, art 119 **Quirk v Burton Hospitals NHS Trust**,
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CA [2002] ICR 602

Part-time employees' retrospective claims — Part-time employees excluded from or having option to join scheme compulsory for full-time employees — Effect of transfer of undertaking on time for bringing claim — Whether time running from end of last contract — Equal Pay Act 1970, s 2(4) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 7
Preston v Wolverhampton Healthcare NHS Trust (No 3), CA [2005] ICR 222

DISCRIMINATION—*continued*
Sex—*continued*
Equal pay—continued
Pension scheme—*continued*

Part-time employees' retrospective claims — Part-time employees excluded from or having option to join scheme compulsory for full-time employees — Whether breach of equality clause — Effect of failure to inform part-time employees of removal of barrier to membership — When series of contracts ceasing to be stable employment relationship — Effect of transfer of undertaking on time for bringing claim — Equal Pay Act 1970, ss 1(1)(2) (as substituted by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2 and modified by Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, reg 12(1)), 2(4) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 7 **Preston v Wolverhampton Healthcare NHS Trust (No 3),** EAT [2004] ICR 993

Part-time employees' retrospective claims time-barred and restricted by national legislation — Whether legislation compatible with Community law — Successive contracts of employment with same employer within stable employment relationship — Whether six-month limitation period running from end of last contract — Equal Pay Act 1970, s 2(4)(5) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt 1, para 2) — Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, reg 12(1)(b) — EC Treaty, art 119 **Preston v Wolverhampton Healthcare NHS Trust (No 2),** HL(E) [2001] ICR 217

Pension scheme providing for surviving spouse — Female member with partner male by gender reassignment — National legislation precluding marriage — Partner not entitled to widower's pension under scheme — Whether contrary to Community equal pay principle — EC Treaty, art 141 EC — Convention for the Protection of Human Rights and Fundamental Freedoms, art 12 **KB v National Health Service Pensions Agency (Case C-117/01),** ECJ [2004] ICR 781

Same employment

Applicants performing work of equal value to workers of different sex employed by previous employer — Whether those workers relevant comparators on claim for equality of pay — Whether applicants able to rely on Community equal pay provision — EC Treaty, art 141(1) EC **Lawrence v Regent Office Care Ltd (Case C-320/00),** ECJ [2003] ICR 1092

Head teacher employed by education authority — Pay scales settled by statutory committee for entire public sector in Scotland — Whether head teacher employed by different education authority relevant comparator — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, s 8(1), Sch 1) — EC Treaty, art 141 EC **South Ayrshire Council v Morton,** Ct of Sess [2002] ICR 956

Male civil servants seeking equality of pay with female employees in different government department — Whether common employer sufficient basis for comparison — Whether single source having responsibility for pay levels — Whether female employees relevant comparators — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1)(6), Sch 1, Pt 1) — EC Treaty, art 141(1) EC **Department for Environment Food and Rural Affairs v Robertson,** CA [2005] ICR 750

Male civil servants seeking equality of pay with female employees in different government department — Whether in "same employment" — Whether female employees relevant comparators — Whether job evaluation study rating comparator's work as equivalent — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1)(6), Sch 1, Pt 1) — EC Treaty, art 141(1) EC **Department for Environment Food and Rural Affairs v Robertson,** EAT [2004] ICR 1289

Woman employed by college dismissed and re-engaged as self-employed through agency on less favourable terms — Claim to equal pay with male employee at college and to access to teachers' pension — Pension only available to employed persons under statutory rules — Whether college employee relevant comparator — Whether comparator necessary for pension claim based on statutory discrimination — Whether statutory pension condition defeasible by evidence of indirect discrimination — Whether self-employed person "worker" for purposes of Community equal pay provision — EC Treaty, art 141 EC **Allonby v Accrington and Rossendale College (Case C-256/01),** ECJ [2004] ICR 1328

Time limit *see also* Damages

Employee working in different departments during employment — Claim for equality of pay with comparators in department employee not working in during last six months of employment — Whether employee "employed in the employment" during final six months — Equal Pay Act 1970, s 2(4) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I) **Young v National Power plc,** CA [2001] ICR 328

DISCRIMINATION—*continued*
Sex—*continued*
Equal pay—continued
Variation due to material difference
Applicant paid less than female employed on like work — Difference not due to sex discrimination — Whether onus on employer objectively to justify difference in pay — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2))
Parliamentary Comr for Admininstration and the Health Service Comrs v Fernandez, EAT [2004] ICR 123

Applicant paid less than male comparators — Length of service reason for differential — Reason having disparate impact on women — Whether employer having to show objective justification for use of length of service — Whether differential justified — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2))
Health and Safety Executive v Cadman, EAT [2004] ICR 378
CA [2005] ICR 1546

Comparator's pay protected following transfer of undertaking — Applicant producing statistics based on pool of 8 to show smaller percentage of women than men entitled to such protection — Whether any onus on employer to prove absence of sex discrimination — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2)) **Nelson v Carillon Services Ltd,** CA [2003] ICR 1256

Vocational training
Pregnancy
Trainee midwives receiving bursaries — Payments terminated during maternity absence — Whether unlawful discrimination — Sex Discrimination Act 1975, s 14 (as substituted by Employment Act 1989, s 7(1)) — Council Directive 76/207/EEC, art 5
Fletcher v NHS Pensions Agency, EAT [2005] ICR 1458

Time limit
Extension of time
Complaint brought more than three months after act of discrimination — Complainant awaiting outcome of internal grievance procedure — Whether sufficient ground for extending time — Whether complainant estopped from pursuing late claims which could have been brought in earlier proceedings — Race Relations Act 1976, s 68(6)
Apelogun-Gabriels v Lambeth London Borough Council, CA [2002] ICR 713

Complaint presented nine years after act complained of — Employee suspecting discrimination in relation to appointment when inspecting file in connection with complaint of subsequent discrimination — Whether just and equitable to extend time — Race Relations Act 1976, s 68
Southwark London Borough Council v Afolabi, CA [2003] ICR 800

Time when act committed
Police constable complaining of failure to deal with numerous acts of discrimination by fellow officers over 11 years — Complaint presented after constable absent on sick leave for one year — Whether ongoing discriminatory treatment of ethnic policewomen "act extending over a period" — Sex Discrimination Act 1975, s 76(6)(b) — Race Relations Act 1976, s 68(7)(b)
Comr of Police of the Metropolis v Hendricks, CA [2003] ICR 530

Victimisation
Race
Employer's policy to allow employees short leave of absence without inquiry — Employee seeking time off to consult adviser prior to hearing of race complaint against employer — Time off refused — Employee dismissed for taking time off without permission — Whether less favourable treatment — Race Relations Act 1976, s 2(1)(a)
Brown v TNT Express Worldwide (UK) Ltd, CA [2001] ICR 182

EDUCATION
Teacher
Disciplinary proceedings
Allegation of inappropriate conduct towards pupil — Disciplinary panel of governors deliberating in private after hearing evidence — Whether chief education officer entitled to attend panel's deliberations — Whether officer's exclusion invalidating panel's finding — Whether appropriate for chief education officer to tender advice to panel in teacher's absence — Education Reform Act 1988, Sch 3, para 8(1)(9) — Education Act 1996, ss 496, 497
R (McNally) v Secretary of State for Education and Employment, CA [2002] ICR 15

EDUCATION—*continued*

Teacher—*continued*

Discrimination

Teacher with congenital heart disorder having child by surrogate — Paid post-natal leave refused on financial grounds — Complaint of disability discrimination — Whether governing body or local education authority correct respondent — Whether any breach of duty — Disability Discrimination Act 1995, s 5(1)(2) — School Standards and Framework Act 1998, Sch 16, para 22 — Education (Modification of Enactments Relating to Employment) Order 1999, art 3(1) **Murphy v Slough Borough Council,** CA [2005] ICR 721

Teacher with congenital heart disorder having child by surrogate — Paid post-natal leave refused on financial grounds — Complaint of disability discrimination — Whether governing body or local education authority correct respondent — Whether refusal less favourable treatment for reason related to disability — Whether treatment justified — Disability Discrimination Act 1995, s 5(1)(2) — School Standards and Framework Act 1998, Sch 16, para 22 — Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 6
Murphy v Slough Borough Council, EAT [2004] ICR 1163

Dismissal

Teacher claiming constructively dismissed — Whether governing body and/or local education authority correct respondents to complaint of unfair dismissal — School Standards and Framework Act 1998, Sch 16, para 25 — Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 3(1), 6
Green v Governing Body of Victoria Road Primary School, EAT [2003] ICR 713
CA [2004] ICR 684

EMPLOYMENT

Breach of contract

Jurisdiction see also **Unfair dismissal:** *Excluded classes*

Indian national living in England contracting to work for Indian company in India — Contract governed by Indian law — Company sending employee to work in England after nine months in India — Further contract containing meaningless governing law clause — Complaints of unlawful deductions and breach of contract — Whether employment tribunal jurisdiction — Contracts (Applicable Law) Act 1990, Sch 1, art 4(1) — Employment Rights Act 1996, s 204 — Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3
Shekar v Satyam Computer Services Ltd, Employment Tribunal [2005] ICR 737

Termination agreement

Agreement concluded after termination of employment — Whether employment tribunal having jurisdiction — Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3 **Miller Bros & F P Butler Ltd v Johnston,** EAT [2002] ICR 744

Contract of employment

Agency worker

Applicant supplied by agency working for five years at local authority hostel — Whether employed by agency — Whether circumstances giving rise to implied contract of service between applicant and local authority **Dacas v Brook Street Bureau (UK) Ltd,**
CA [2004] ICR 1437

Applicant working for 5 years for client of employment agency — Whether contract of employment with client to be implied — Whether applicant "employee" — Employment Rights Act 1996, s 230(1) **Franks v Reuters Ltd,** CA [2003] ICR 1166

Applicant working part-time on one long-term assignment — Assignment terminated after $2\frac{1}{2}$ years — Complaint of unfair dismissal — Whether applicant "employee" of agency
Montgomery v Johnson Underwood Ltd, CA [2001] ICR 819

Worker supplied by agency to company — Whether contract of service with company — Subsequent permanent employment with company — Whether worker able to rely on supply period to establish requisite period of employment for unfair dismissal complaint
Stephenson v Delphi Diesel Systems Ltd, EAT [2003] ICR 471

Apprentice

Apprentice engaged under standard form "modern apprenticeship pact" — Employer agreeing to employ and apprentice agreeing to comply with employer's terms and conditions of employment "for the duration of the training plan" — Whether agreement terminable by notice in accordance with employer's terms and conditions before completion of training
Whitely v Marton Electrical Ltd, EAT [2003] ICR 495

Modern apprenticeship agreement — Whether breach by employer giving rise to damages for loss of training — Appropriate notice of termination **Flett v Matheson,** EAT [2005] ICR 1134

Modern apprenticeship agreement — Whether contract of employment **Thorpe v Dul,**
EAT [2003] ICR 1556

EMPLOYMENT—*continued*

Contract of employment—*continued*

Breach of contract

Bonus payable in anticipation of future loyalty — Whether employer obliged to exercise discretion as to payment of bonus — Whether employee entitled to fair and rational bonus assessment — Assessment of bonus following wrongful dismissal
Horkulak v Cantor Fitzgerald International, CA [2005] ICR 402

Collective agreement

Employers negotiating revised terms with union — No ballot of employees — Union informing employers majority of 1,500 employees consenting to revised terms — Petition objecting to new terms by 130 employees continuing to work under protest — Proceedings issued by 61 employees two years later — Whether bound by agreement
Henry v London General Transport Services Ltd, CA [2002] ICR 910

Provision in collective agreement relied on by employee as precluding compulsory redundancy — Whether intended or apt to be incorporated as term of employee's contract of employment
Kaur v MG Rover Ltd, CA [2005] ICR 625

Company director

Controlling shareholder having service contract with company — Whether "employee" for purpose of unfair dismissal claim — Employment Rights Act 1996, s 230(1)
Connolly v Sellers Arenascene Ltd, CA [2001] ICR 760

Disciplinary proceedings

Different procedures for personal and professional conduct — Whether for employer to decide category of conduct — Whether reasonableness of decision relevant
Saeed v Royal Wolverhampton Hospitals NHS Trust, CA [2001] ICR 903

Employer local authority — Disciplinary proceedings against employees concerning death of child — Statutory inquiry into death pending — Employer refusing to adjourn proceedings until after inquiry — Whether refusal susceptible to judicial review — Risk of proceedings affecting employees' health and preventing participation in inquiry — Whether employer in breach of implied duty of trust and confidence — Whether disciplinary proceedings to be adjourned **R (Arthurworrey) v Haringey London Borough Council,** Jackson J [2002] ICR 279

Medical practitioner deliberately misleading patient as to problems occurring during operation — Whether personal or professional conduct — Professional conduct to be dealt with by external panel with medical expertise — Practitioner dismissed following internal disciplinary and appeal proceedings — Whether appropriate procedure
Skidmore v Dartford and Gravesham NHS Trust,
EAT [2001] ICR 911
CA [2002] ICR 403
HL(E) [2003] ICR 721

Fiduciary duty

Salaried director attempting to divert company's business to own company summarily dismissed — Salary paid monthly in arrears — Whether director under duty to disclose own misconduct to company — Whether entitled to proportion of salary up to mid-month date of dismissal — Apportionment Act 1870, s 2 **Item Software (UK) Ltd v Fassihi,** CA [2005] ICR 450

General practitioner

Practitioner providing services to health authority — Terms of service governed by statutory regulations — Whether "employee" for purpose of unfair dismissal claim — Whether in "employment" or "contract worker" for purpose of race discrimination claim — Race Relations Act 1976, ss 7, 78 — Employment Rights Act 1996, s 230(1)
North Essex Health Authority v David-John, EAT [2004] ICR 112

Illegality

Employer failing to deduct tax and national insurance — Employee having limited knowledge of English language and tax provisions — Whether participating in illegal performance of contract of employment — Whether precluded from pursuing claim for unfair dismissal
Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant), CA [2005] ICR 265

Payments of sales commission made so as to minimise tax — Complaint of unfair dismissal and claim for payment of commission — Whether burden on employer of establishing contract tainted with illegality — Whether contract enforceable **Colen v Cebrian (UK) Ltd,** CA [2004] ICR 568

EMPLOYMENT—*continued*

Contract of employment—*continued*

Implied term

Employee alleging campaign by employer to demoralise before dismissing — Compensation awarded for unfair dismissal — Subsequent claim for damages for stress-related illness caused by employer's conduct prior to dismissal — Whether claim sustainable
Eastwood v Magnox Electric plc (Note), CA [2003] ICR 520

Employee prior to dismissal subjected to conduct by employer in breach of duty to act fairly — Compensation awarded for unfair dismissal — Subsequent claim for damages in relation to illness caused by employer's conduct prior to dismissal — Whether claim sustainable
Eastwood v Magnox Electric plc, HL(E) [2004] ICR 1064
McCabe v Cornwall County Council, HL(E) [2004] ICR 1064

Employee suspended for three years before dismissal — Compensation awarded for unfair dismissal — Subsequent claim for damages for psychiatric injury caused by suspension — Whether claim to be struck out **McCabe v Cornwall County Council,** CA [2003] ICR 501

Employer in liquidation reputed to have acted fraudulently — Redundant employees proving in liquidation for compensation for loss of employment prospects — Whether employer's breach of implied obligation of good faith cause of employees' failure to obtain further employment — Whether employees entitled to stigma damages
Bank of Credit and Commerce International SA v Ali (No 2), CA [2002] ICR 1258

Employer intending to dismiss employee by reason of redundancy — Employer dismissing employee for other reason — Employee thereby deprived of contractual redundancy benefits — Whether implied term prohibiting dismissal for any reason other than redundancy
Jenvey v Australian Broadcasting Corpn, Elias J [2003] ICR 79

Employer offering enhanced redundancy scheme for incorporation in contracts of permanent employees — Applicant not granted offer in mistaken belief temporary employee — Whether breach of implied term of trust and confidence **Transco plc v O'Brien,** CA [2002] ICR 721

Redundant employees entering into agreement settling all claims arising from employment — Employer subsequently found to have conducted business illegally and dishonestly — Employees claiming stigma damages for breach of implied term of trust and confidence and misrepresentation — Whether claims barred by agreement
Bank of Credit and Commerce International SA v Ali, HL(E) [2001] ICR 337

Senior manager on high earnings — Campaign of bullying and intimidation by chief executive using foul and abusive language — Whether employer in breach of implied term of trust and confidence **Horkulak v Cantor Fitzgerald International,** Newman J [2004] ICR 697

Office holder

Registrar of births, marriages and deaths — Office of registrar held during pleasure of Registrar General — Registrar appointed and paid by local authority — Whether employee of local authority — Registration Service Act 1953, s 6(4) — Employment Rights Act 1996, s 230(1)
Lincolnshire County Council v Hopper, EAT [2002] ICR 1301

Part-time worker

Contract for work when offered with no fixed working time or salary and worker entitled to refuse work — National legislation laying down general maxima for working time but no particular maxima for part-time workers — Whether employee within scope of Community provisions on equal treatment and part-time work — Whether national legislation or contract precluded by Community provisions — Whether full-time employees of same employer relevant comparators — Council Directive 76/207/EEC, arts 2(1), 5(1) — Council Directive 97/81/EC, Annex, clause 4 **Wippel v Peek & Cloppenburg GmbH & Co KG** (Case C-313/02), ECJ [2005] ICR 1604

Retained fire fighters claiming less favourable treatment than whole-time fire fighters — Whether same type of contract — Whether engaged in same or broadly similar work — Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regs 2(3)(4), 5
Matthews v Kent and Medway Towns Fire Authority, EAT [2004] ICR 257
CA [2005] ICR 84

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Council employee resigning following abuse from councillor — Whether repudiatory conduct attributable to council **Moores v Bude-Stratton Town Council,** EAT [2001] ICR 271

EMPLOYMENT—*continued*

Contract of employment—*continued*

Share option

Employee granted share options under company scheme — Directors' absolute discretion to determine appropriate proportion employee permitted to exercise — Employee on dismissal not permitted to exercise any options — Whether discretion exercised reasonably
Mallone v BPB Industries Ltd, CA [2002] ICR 1045

Sick pay benefit scheme

Employer's scheme providing benefit as long as employee "unable to work" — Insurers under supporting insurance policy discontinuing cover when satisfied employee not disabled from every employment activity — Whether entitlement to benefit independent of insurance — Whether employee "unable to work" **Jowitt v Pioneer Technology (UK) Ltd,** CA [2003] ICR 1120

Statutory restriction

Local authority employee — Contractual entitlement to gratuity on retirement — Whether term on which employee "holds office" — Subsequent legislation restricting maximum retirement gratuity payable by local authority — Whether contractual term rendered unenforceable — Local Government Act 1972, s 112(2) — Local Government (Discretionary Payments) Regulations 1996, reg 41(3) **Nicholls v Greenwich London Borough Council,** CA [2003] ICR 1020

Termination

Agreement extending employment on redundancy to enable employee to claim enhanced pension benefits — Agreement ultra vires local authority employer — Whether irrational and unlawful to award enhanced benefits — Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000, reg 8
R (Foster) v Eastbourne Borough Council, CA [2004] ICR 1149

Contract terminable on six months' notice giving employer option to make payment in lieu — Employee summarily dismissed without cause or payment in lieu — Whether entitled to six months' salary in lieu — Whether earnings during notice period to be deducted from award
Cerberus Software Ltd v Rowley, CA [2001] ICR 376

Disappearance of employee's position — Agreement for employee to continue working for employer on different basis for further year — Agreement subsequently found to be ultra vires employer — Whether employment relationship continuing — Date of termination
Eastbourne Borough Council v Foster, CA [2002] ICR 234

Employee accepting early retirement as effective from earlier date — Whether agreed date "effective date of termination" — Employment Rights Act 1996, ss 97(1)(b), 203(1)
Fitzgerald v University of Kent at Canterbury, CA [2004] ICR 737

Employee not returning to work after demotion — Employer stating failure to return by stated date to be taken as resignation — Whether dismissal with notice — Employee presenting unfair dismissal complaint prior to stated date — Whether complaint in time — Employee claiming repudiatory conduct by employer — Whether acceptance by employee by conduct or by presentation of complaint — Employment Rights Act 1996, s 111(3)
Rai v Somerfield Stores Ltd, EAT [2004] ICR 656

Employee's contract terminated after protracted unpaid sick leave — Claim for statutory entitlement to pay during notice period — Contractual notice period one week more than statutory minimum — Whether constituting failure to give statutory notice — Whether claim precluded — Employment Rights Act 1996, ss 86(1), 87(1)(4), 88(1), 91(5)
The Scotts Co (UK) Ltd v Budd, EAT [2004] ICR 299

Teacher applying for ill-health retirement benefit on ground of permanent incapacity — Whether contract terminating by teacher's resignation on receipt of benefit — Whether employer required to serve notice of dismissal **Healey v Bridgend County Borough Council (Note),** CA [2004] ICR 561

Teacher applying for ill-health retirement benefit on ground of permanent incapacity — Whether contract terminating on acceptance of benefit — Whether employers required to serve notice of dismissal — Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, reg 7(1) **R (Verner) v Derby City Council,** Lindsay J [2004] ICR 535

Teacher incapable of work due to ill health — Whether contract automatically terminated by incapacity — Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, reg 7 **R (Dorling) v Sheffield City Council,** Goldring J [2003] ICR 424

EMPLOYMENT—*continued*
Contract of employment—*continued*
Variation: see TRADE UNION: **Shop stewards:** *Authority of*

Disability
Employment
Former employee
Dismissal for ill-health upheld on internal appeal — Complaint of failure to make reasonable adjustments including employers' rejection of claimant's post-dismissal request to revoke dismissal — Whether "act extending over a period" — Whether jurisdiction to consider post-dismissal claim — Complaint 2 days out of time due to secretarial oversight — Whether just and equitable to extend time — Disability Discrimination Act 1995, s 6(1), Sch 3, para 3
Baynton v South West Trains Ltd, EAT {2005{ ICR 1730

Employer's insolvency
Administration order
Redundancy payments and unfair dismissal claims on termination by administrator of employees' contracts — Whether payable as administration expenses — Insolvency Act 1986, Sch B1, para 99 (as inserted by Enterprise Act 2002, ss 248(1), 249, Sch 16) — Insolvency Rules 1986, r 2.67(1)(f) (as substituted by Insolvency (Amendment) Rules 2003 Sch 1, r 9)
In re Allders Department Stores Ltd, Lawrence Collins J [2005] ICR 867

Debt due to employee
Employee contractually entitled to specified hourly rate in case of lay-off — Application to Secretary of State for payment — Secretary of State paying lesser amount of statutory guarantee payment — Whether contractual payment "arrears of pay" — Employment Rights Act 1996, ss 28, 182, 184(1)(2) **Benson v Secretary of State for Trade and Industry,** EAT [2003] ICR 1082

Employees owed protective award — Application to Secretary of State for payment — Statutory limit imposed before deductions made — Whether correct method of calculation — Employment Rights Act 1996, s 186(1) — Council Directive 80/987/EEC, art 4(3)
Titchener v Secretary of State for Trade and Industry, EAT [2002] ICR 225

Health and safety disclosure
Former employee
Claimant alleging detriment suffered after termination of employment due to disclosure during employment — Whether tribunal jurisdiction — Employment Rights Act 1996, s 44(1)
Fadipe v Reed Nursing Personnel (Note), CA [2005] ICR 1760

Maternity rights
Annual leave
Employee's maternity leave coinciding with period for annual leave fixed by collective agreement — Whether employee entitled to take annual leave outside fixed period — Whether entitlement only to minimum period set by Community law or to longer period set by national law — Council Directive 76/207/EEC, art 5(1) — Council Directive 92/85/EEC, art 11(2)(a) — Council Directive 93/104/EC, art 7(1)
Merino Gómez v Continental Industrias del Caucho SA (Case C-342/01), ECJ [2005] ICR 1040

Return to work
Applicant unable to return on agreed date of return owing to pregnancy-related illness — Employers refusing to allow applicant to return at later date — Whether unfair dismissal — Whether sex discrimination — Sex Discrimination Act 1975, s 6(2) — Employment Protection (Consolidation) Act 1978, ss 42(1) (as substituted by Trade Union Reform and Employment Rights Act 1993, s 23(1)(b), Sch 2), 56 **Halfpenny v IGE Medical Systems Ltd,** HL(E) [2001] ICR 73

Partnership
Continuity of employment
Claimants employed by partnership of two solicitors — One solicitor struck off — Whether continuity of employment maintained where partnership dissolved and business carried on by sole partner — Employment Rights Act 1996, s 218(5) **Bower v Stevens,** CA [2004] ICR 1582

Pension scheme
Entitlement to pension
Redundancy — Whether retirement "at employer's request" — Whether distinction between compulsory and voluntary redundancy
AGCO Ltd v Massey Ferguson Works Pension Trust Ltd, CA [2004] ICR 15

EMPLOYMENT—*continued*
Pension scheme—*continued*
Final salary
Remuneration for purposes of calculating final salary excluding "non contractual" overtime — Employee's contractual duties involving work outside normal hours — Whether pay for overtime worked to be included in calculation — Local Government Pension Scheme Regulations 1995, reg C2 **Newham London Borough Council v Skingle,** Jacob J [2002] ICR 1118
CA [2003] ICR 1008

Teacher moving to lower pay scale on restructuring but maintaining nominal salary — Whether employed at "reduced rate of contributable salary" — Teachers' Pensions Regulations 1997, regs C1(2), H1, Sch 10, Pt II, para 13 **Secretary of State for Education and Skills v Bailey,** Pumfrey J [2004] ICR 181

Retirement
Executive director relinquishing responsibilities of managing director but continuing as unpaid non-executive director — Whether "retirement" — Whether payments from pension fund chargeable to tax — Income and Corporation Taxes Act 1988, s 600(1)(2)
Venables v Hornby, Lawrence Collins J [2002] ICR 81
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Protected disclosure
Compensation
Complaint of subjection to detriment — Employee constructively dismissed — Whether compensation recoverable for injury to feelings up to resignation — Complaint of unfair dismissal — Compensation for future loss discounted for accelerated payment — Whether appropriate to apply equivalent increase for delayed payment — Whether just and equitable to reduce compensation for misconduct unconnected with dismissal — Employment Rights Act 1996, ss 47B (as inserted by Public Interest Disclosure Act 1998, s 18(2)), 49, 123
Melia v Magna Kansei Ltd, EAT [2005] ICR 874

Complaint
Compromise agreement on termination of employment — Agreement compromising "all claims" arising out of employment — No specific reference to claim of detriment from protected disclosure — Whether claim precluded by agreement — Employment Rights Act 1996, s 203
University of East London v Hinton, CA [2005] ICR 1260

Disclosures prior to provisions coming into effect
Employee suspended from work for breach of confidence while absent due to stress-related illness — Dismissal for incapacity two days after protected disclosure provisions coming into force — Whether employee subjected to any relevant detriment by act or deliberate failure to act by employer — Employment Rights Act 1996, s 47B(1) (as inserted by Public Interest Disclosure Act 1998, s 2) **Pinnington v Swansea City and County Council,** CA [2005] ICR 685

Former employee
Claimant alleging detriment suffered after termination of employment due to protected disclosure during employment — Whether tribunal jurisdiction — Employment Rights Act 1996, ss 47B, 48(1A) (as inserted by Public Interest Disclosure Act 1998, ss 2, 3)
Woodward v Abbey National plc (No 1), EAT [2005] ICR 1750

Reasonable belief
Employee dismissed following disclosure of information — Tribunal finding information disclosed factually incorrect — Whether employee having "reasonable belief" disclosure showing relevant failure — Whether "protected disclosure" — Employment Rights Act 1996, s 43B(1) (as inserted by Public Interest Disclosure Act 1998, s 1)
Darnton v University of Surrey, EAT [2003] ICR 615

Remedy
Statutory provisions coming into force after disclosure but before employer's detrimentary act — Whether statutory remedy available — Employment Rights Act 1996, s 47B (as inserted by Public Interest Disclosure Act 1998, s 2) **Meteorological Office v Edgar,** EAT [2002] ICR 149

Teacher subjected to detriment and dismissal for making protected disclosure — Award of £42,500 for injury to feelings — Whether excessive — Whether aggravated damages available — Whether exemplary damages available — Employment Rights Act 1996, ss 47B (as inserted by Public Interest Disclosure Act 1998, s 2), 49 **Virgo Fidelis Senior School v Boyle,** EAT [2004] ICR 1210

EMPLOYMENT—*continued*

Protected disclosure—*continued*

Unfair dismissal

Employee complaining of detriment and dismissal for making protected disclosure — Tribunal finding protected disclosure principal reason for dismissal — Employer's witnesses as to employees' good faith and reasonableness of disclosure excluded — Whether relevant evidence — Employment Rights Act 1996, ss 47B, 103A (as inserted by Public Interest Disclosure Act 1998, ss 2, 5) **ALM Medical Services Ltd v Bladon**, CA [2002] ICR 1444

Tribunal finding disclosures made for reasons of personal antagonism — Whether employee's motive relevant to assessment of good faith — Whether post disclosure conduct relevant — Employment Rights Act 1996, ss 43G(1)(a), 103A (as inserted by Public Interest Disclosure Act 1998, ss 1, 5) **Street v Derbyshire Unemployed Workers' Centre**, EAT [2004] ICR 213

Tribunal finding disclosures made for reasons of personal antagonism — Whether employee's motive relevant to assessment of "good faith" — Employment Rights Act 1996, s 43G(1)(a) (as inserted by Public Interest Disclosure Act 1998, s 1)
Street v Derbyshire Unemployed Workers' Centre, CA [2005] ICR 97

Redundancy *see also* **Unfair dismissal:** *Excluded classes*

Continuity of employment

Employee participating in employer's child break scheme after 17 years' employment — Scheme guaranteeing re-employment at same level while requiring employee to resign and work for minimum of 2 weeks each year — Employee made redundant after returning to work — Whether relations with employer governed by contract of employment during break — Whether employee to be regarded as continuing in employment by arrangement — Whether "continuously employed" — Employment Rights Act 1996, ss 162(1), 212(1)(3)(c)
Curr v Marks & Spencer plc, CA [2003] ICR 443

Dismissal for redundancy

Law Society intervention in firm of solicitors — Agents effecting intervention telling employees no longer required but free to remain on voluntary basis — Transfer of firm — Whether intervention operating to terminate contracts of employment — Whether employees dismissed — Solicitors Act 1974, s 35 — Employment Rights Act 1996, s 136(5)
Barnes v Leavesley, EAT [2001] ICR 38

Law Society intervention in solicitor's practice — Transfer of firm — Whether intervention operating to terminate contracts of employment — Whether employee dismissed — Solicitors Act 1974, s 35, Sch 1, para 16 — Employment Rights Act 1996, s 136(5) **Rose v Dodd**, CA [2005] ICR 1776

Trade union consultation

Merger of companies resulting in redundancies — Whether duty to consult arising before employers' proposals formulated — Field staff assigned to branch offices — Whether branch office relevant "establishment" — Trade Union and Labour Relations (Consolidation) Act 1992, s 188(1)(1A) (as substituted by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 3) — Council Directive 75/129/EEC, arts 1, 2 (as amended by Council Directive 92/56/EC, art 1)
MSF v Refuge Assurance plc, EAT [2002] ICR 1365

Parent company withdrawing financial support from employers — Employees dismissed without proper consultation — Whether special circumstances — Trade Union and Labour Relations (Consolidation) Act 1992, s 188(4)(7) (as amended by Trade Union Reform and Employment Rights Act 1993, s 34(2) and Collective Redundancies and Transfer of Undertakings Regulations 1995, reg 3) — Council Directive 98/59/EC, art 2 **GMB v Amicus**, EAT [2003] ICR 1396

Protective award — Approach to assessment — Trade Union and Labour Relations (Consolidation) Act 1992, s 189 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 4 and Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 5) **Susie Radin Ltd v GMB**, CA [2004] ICR 893

Protective award — Award made more than three months after expiry of protected period — Failure to pay remuneration under award — Whether reasonably practicable to present complaint in time — Whether further period reasonable — Trade Union and Labour Relations (Consolidation) Act 1992, ss 189(2)(3), 192
Howlett Marine Services Ltd v Bowlam, EAT [2001] ICR 595

Work of a particular kind

Reorganisation by employer — Employee refusing to undertake additional duties — Whether diminution in employer's requirements for work of a particular kind — Whether dismissal by reason of redundancy — Employment Rights Act 1996, s 139(1)(b)(i)
Shawkat v Nottingham City Hospital NHS Trust (No 2), CA [2002] ICR 7

EMPLOYMENT—*continued*

Right to be accompanied

Disciplinary hearing

Employee refused representation at investigatory interview resulting in oral warning — Warning remaining on employee's record for 12 months — Whether "formal warning" — Whether interview "disciplinary hearing" — Employment Relations Act 1999, ss 10, 13(4)
London Underground Ltd v Ferenc-Batchelor, EAT [2003] ICR 656

Time off

Health and safety representative

Employer refusing representative time off with pay to attend training course — Correct test — Whether employment tribunal jurisdiction to hear claim — Whether appeal tribunal jurisdiction to hear appeal — Employment Tribunals Act 1996 ss 2, 21(1) (as amended by Employment Rights (Dispute Resolution) Act 1998, Sch 1, para 17) — Safety Representatives and Safety Committees Regulations 1977, regs 4(2), 11 — Trade Union and Labour Relations Act 1974, Sch 1, para 16(1) **Duthie v Bath and North East Somerset Council,** EAT [2003] ICR 1405

Time off for dependants

Parental leave

Employee absent for one day to look after son — Whether entitled to leave for one day only — Employment Rights Act 1996, s 47C (as inserted by Employment Relations Act 1999, Sch 4, Pt III, para 8) — Maternity and Parental Leave etc Regulations 1999, Sch 2, para 7
New Southern Railway Ltd (formerly South Central Trains Ltd) v Rodway, CA [2005] ICR 1162

Employee given written warning for non-attendance at work when absent for one day to look after son — Whether employee entitled to leave for one day only — Whether detriment for reason relating to parental leave — Employment Rights Act 1996, s 47C (as inserted by Employment Relations Act 1999, Sch 4, Pt III, para 8) — Maternity and Parental Leave etc Regulations 1999, Sch 2, para 7 **South Central Trains Ltd v Rodway,** EAT [2005] ICR 75

Reason for absence

Employee requesting time off to look after child — Employee failing to explain breakdown in childcare arrangements to employer — Whether telling employer of reason for absence — Employment Rights Act 1996, s 57A(2) (as inserted by Employment Relations Act 1999, s 8, Sch 4, Pt II) **Truelove v Safeway Stores plc,** EAT [2005] ICR 589

Unfair dismissal

Employee dismissed for high level of absences claiming entitled to time off to deal with child's illness — Dispute as to employee's compliance with requirement to inform employer — Relevant factors in determining whether time taken necessary and reasonable — Employment Rights Act 1996, ss 57A, 99 (as inserted and substituted by Employment Relations Act 1999, ss 8, 9, Sch 4, Pt II, Pt III, para 16) **Qua v John Ford Morrison,** EAT [2003] ICR 482

Employee suffering bereavement reaction dismissed for absence following parents' deaths — Whether time off to take action necessary in consequence of deaths — Employment Rights Act 1996, ss 57A, 99 (as inserted and substituted by Employment Relations Act 1999, s 8, 9, Sch 4, Pt 11, Pt 111, para 16) **Forster v Cartwright Black,** EAT [2004] ICR 1728

Transfer of undertaking

Effect of transfer

Employee complaining of unfair dismissal on trade union grounds granted interim order continuing employment — Transfer of employer's undertaking — Whether relationship under order constituting "contract of employment" for purposes of transfer — Whether employer's liability under continuation order transferring to transferee — Trade Union and Labour Relations (Consolidation) Act 1992, ss 163, 164 — Employment Rights Act 1996, s 230(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 2(1), 5(1)
Dowling v M E Ilic Haulage, EAT [2004] ICR 1176

Employee's claim in negligence for injury at work — Whether liability transferring to transferee — Claim covered by transferor's employer's liability insurance — Whether transferor's rights under policy transferring to transferee — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5(2) **Martin v Lancashire County Council,** CA [2001] ICR 197

Employer discontinuing business giving notice of dismissal — Employees continuing business after dismissal date — Whether liability for redundancy and short notice transferring to employees — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5
Matthews (trading as Anton Motors) v Smith, CA [2003] ICR 460

EMPLOYMENT—*continued*

Transfer of undertaking—*continued*

Pension scheme

Early retirement benefits — Transferee offering less favourable terms than transferor — Whether "old-age . . . benefits" — Whether transferred employees entitled to benefit of transferor's terms — Whether employees accepting early retirement waiving right to transferor's terms — Council Directive 77/187/EEC, art 3 **Martin v South Bank University (Case C-04/01),** ECJ [2004] ICR 1234

Early retirement benefits payable on redundancy — Whether "old-age . . . benefits" — Whether liability for benefits transferring to transferee — Benefits implemented by statutory instrument — Whether relevant — Council Directive 77/187/EEC, art 3
Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00), ECJ [2003] ICR 50

Protection of employees

Civil servants seconded to work for training and enterprise council on transfer of business to council — Applicants electing to become employees of council 3 years later — Whether transfer of undertaking already completed — Whether continuity of employment preserved — Council Directive 77/187/EEC, arts 1(1), 3(1) **CELTEC Ltd v Astley,** CA [2002] ICR 1289

Civil servants seconded to work for training and enterprise council on transfer of business to council — Applicants electing to become employees of council 3 years later — Whether transfer of undertaking already completed — Whether "date of a transfer" point in time only or also extending to period of time — Council Directive 77/187/EEC, art 3(1)
CELTEC Ltd v Astley (Case C-478/03), ECJ [2005] ICR 1409

Employees benefiting from transferor's profit-sharing scheme — Whether entitled to retain benefit of same scheme on transfer — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5(2) **MITIE Management Services Ltd v French,** EAT [2002] ICR 1395

Failure to consult workforce — Applicant redundant because of transfer — No employee representatives — Whether duty to consult individual employees — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 2) **Howard v Millrise Ltd,** EAT [2005] ICR 435

Failure to consult workforce — Whether liability for failure transferring to transferee — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 2) **Alamo Group (Europe) Ltd v Tucker,** EAT [2003] ICR 829

Ferry service — Whether seafarers excluded from protection — Whether domestic legislation ultra vires — Ships not acquired by new provider — Whether relevant transfer of undertaking — European Communities Act 1972, s 2(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 2(2) — Council Directive 77/187/EEC, art 1(3)
NUMAST v P & O Scottish Ferries Ltd, EAT(Sc) [2005] ICR 1270

Trade union complaining of failure to consult prior to transfer — Whether liability for failure devolving on transferees — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 2)
Transport & General Workers' Union v McKinnon, J R Haulage Ltd, EAT(Sc) [2001] ICR 1281

Relevant transfer

Local authority maintenance work contracted out to private company — Company going into liquidation — Work continuing on informal basis — Local authority terminating arrangement and carrying out work itself — Company ceasing business — Whether transfer of undertaking back to local authority — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3 — Council Directive 77/187/EEC, art 1(1)
Perth and Kinross Council v Donaldson, EAT(Sc) [2004] ICR 667

Unfair dismissal

Employee resigning following changes to working conditions — Complaint of unfair dismissal — Whether necessary to establish repudiatory breach of contract by employer — Employment Rights Act 1996, s 95(1)(c) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5(5) (as amended by Trade Union Reform and Employment Rights Act 1993, s 33), 8(1) — Council Directive 77/187/EEC, art 4(2) **Rossiter v Pendragon plc,**
EAT [2001] ICR 1265
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EMPLOYMENT—*continued*
Transfer of undertaking—*continued*
Whether relevant transfer

Body governed by private law carrying out activities promoting interests of local authority — Activities taken over by local authority — Whether "transfer" of undertaking — Council Directive 77/187/EEC, art 1(1)
Mayeur v Association Promotion de l'Information Messine (APIM) (Case C-175/99), ECJ [2002] ICR 1316

Electrician performing routine maintenance at airbase — Maintenance work at base divided into packages and offered to tender — Electrician's work forming one package — Whether package "undertaking" transferred — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3(1) **Dudley Bower Building Services Ltd v Lowe,** EAT [2003] ICR 843

Hospital cleaning and catering services moving to different hospital — Employees not transferring — Whether transfer of undertaking — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3(1) **RCO Support Services Ltd v UNISON,** CA [2002] ICR 751

Local authority awarding contract for bus service to new operator following tendering procedure — No contractual link between old and new operators — No transfer of significant tangible assets but some drivers re-engaged — Whether relevant transfer — Council Directive 77/187/EEC, art 1(1) — Council Directive 92/50/EEC, art 3(1)
Liskojärvi v Oy Liikenne Ab (Case C-172/99), ECJ [2002] ICR 155

Local authority maintenance contract for whole borough re-contracted to two new contractors partition on borough into two areas — Whether transfer of "a part of an undertaking" to new contractor — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 2(2), 3(1) **Fairhurst Ward Abbotts Ltd v Botes Building Ltd,** CA [2004] ICR 919

Local authority non-profit-making refuse service transferred to profit-making company — Whether service "in the nature of a commercial venture" — Whether employees' rights protected — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 2(1) — Council Directive 77/187/EEC, art 1 **Alderson v Secretary of State for Trade and Industry,** CA [2004] ICR 512

Transfer from one undertaking to another of service contracted out by public body — Council Directive 77/187/EEC, art 1(1)
Sánchez Hidalgo v Asociación de Servicios Aser (Case C-173/96) (Note), ECJ [2002] ICR 73

Transfer from public body to private-law company owned by state — Whether within scope of Community Directive — Transferee liable to employees for payments linked to length of service — Whether length of service with transferor to be taken into account — Council Directive 77/187/EEC, arts 1(1), 3(1) **Collino v Telecom Italia SpA** (Case C-343/98), ECJ [2002] ICR 38

Unfair dismissal
Compensation
Assessment *see also* **Protected disclosure:** *Compensation*

Applicant receiving incapacity benefit — Whether deductible from compensatory award for loss of earnings — Employment Rights Act 1996, s 123(1)
Morgans v Alpha Plus Security Ltd, EAT [2005] ICR 525

Employee claiming compensation for injury to feelings arising from manner of dismissal — Whether jurisdiction to compensate for non-economic loss — Employment Rights Act 1996, s 123(1) **Dunnachie v Kingston upon Hull City Council,** EAT [2003] ICR 1294
CA [2004] ICR 481
HL(E) [2004] ICR 1052

Failure to comply with reinstatement order — Calculation of compensatory award — Employment Rights Act 1996, ss 114(2), 117(3), 124
Parry v National Westminster Bank plc, CA [2005] ICR 396

Loss of future earnings
Tribunal assessing loss by reference to Ogden Tables — Whether appropriate
Kingston upon Hull City Council v Dunnachie (No 3), EAT [2004] ICR 227

Mitigation of loss
Employee dismissed on medical grounds following back injury — Tribunal finding dismissal unfair — Employee refusing offer of re-engagement on part-time basis — Whether failure to mitigate loss **Wilding v British Telecommunications plc,** CA [2002] ICR 1079

EMPLOYMENT—*continued*
  Unfair dismissal—*continued*
    Compensation—continued
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Employee receiving pay in lieu of notice obtaining employment in notice period — Whether credit to be given for earnings in calculating compensatory award — Employment Rights Act 1996, s 123 **Voith Turbo Ltd v Stowe,** EAT [2005] ICR 543

Employee summarily dismissed starting new employment during notice period — Whether credit to be given for earnings in calculating compensatory award — Employment Rights Act 1996, s 123 **Hardy v Polk (Leeds) Ltd (Note),** EAT [2005] ICR 557

Reinstatement order

Tribunal making reinstatement order with compensation for loss of pay — Employer failing to comply with reinstatement order — Calculation of compensatory award — Whether tribunal entitled to include losses prior to date ordered for reinstatement — Employment Rights Act 1996, ss 114(2), 117(3) **Awotona v South Tyneside Healthcare NHS Trust,** CA [2005] ICR 958

Complaint
Time limit

Complaint posted by first class post on Friday before expiry of time limit on Sunday — Complaint failing to arrive until Tuesday — Whether "reasonably practicable" to have presented complaint in time — Regime for service of documents in employment tribunals — Employment Rights Act 1996, s 111(2)
Consignia plc (formerly The Post Office) v Sealy, CA [2002] ICR 1193

Complaint sent to tribunal by e-mail 8 hours before expiry of time limit — No indication not received — Complaint presented in person two days after inquiries revealing e-mail not received — Whether "reasonably practicable" to have presented complaint in time — Employment Rights Act 1996, s 111(2)(b) **Initial Electronic Security Systems Ltd v Avdic,** EAT [2005] ICR 1598

Complaint sent within time limit online to Employment Tribunals Service website — Website operated by service provider — Complaint not received by employment tribunal — Whether presented in time — Employment Rights Act 1996, s 111
Tyne and Wear Autistic Society v Smith, EAT [2005] ICR 663

Employee unsuccessfully pursuing internal appeal before presenting complaint — Complaint out of time — Whether "reasonably practicable" for complaint to be presented in time — Employment Rights Act 1996, s 111(2) **Marks & Spencer plc v Williams-Ryan,** CA [2005] ICR 1293

Constructive dismissal

Tribunal dismissing complaint after hearing only applicant's evidence — Whether reasonable exercise of discretion **Logan v Customs and Excise Comrs,** CA [2004] ICR 1

Continuous employment

Dismissed employee reinstated on internal appeal two months later — Employer one month later deciding not to reinstate — Whether reinstatement taking place — Whether "arrangement" preserving continuity of employment between initial dismissal and reinstatement — Whether employee having necessary period of continuous employment — Employment Rights Act 1996, s 212(3)(c) **London Probation Board v Kirkpatrick,** EAT [2005] ICR 965

Dismissed
Agreement to terminate employment

Employee faced with choice between job change or redundancy accepting redundancy — Whether dismissed **Lassman v De Vere University Arms Hotel,** EAT [2003] ICR 44

Employer's appeal procedure

Employee dismissed for misconduct initiating appeal — Presentation of unfair dismissal complaint while appeal pending — Employer substituting demotion for dismissal on appeal — Whether employee "dismissed" for purposes of unfair dismissal complaint
Roberts v West Coast Trains Ltd, CA [2005] ICR 254

Repudiatory conduct *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Review of decision*

Cumulative acts by employer — Employee resigning in response to act of employer found to be reasonable and justifiable — Whether sufficient to constitute last straw entitling employee to resign **Omilaju v Waltham Forest London Borough Council,** CA [2005] ICR 481

EMPLOYMENT—*continued*
Unfair dismissal—*continued*
Dismissed—continued
Repudiatory conduct—*continued*

Employee with no disciplinary record leaving workplace for 1 hour without permission — Employer imposing final written warning — Whether capable of amounting to repudiatory breach by employer **Stanley Cole (Wainfleet) Ltd v Sheridan,** EAT [2003] ICR 297

Excluded classes
Police

Transport police sergeant's complaint of unfair dismissal — Whether transport police "constabulary maintained by virtue of an enactment" — Whether sergeant employed in "police service" — British Transport Commission Act 1949, s 53(1) (as amended by Railways Act 1993, Sch 10, para 1) — Employment Rights Act 1996, s 200 **Spence v British Railways Board,** EAT [2001] ICR 232

Retirement

Normal retiring age — Employee with unique position having contractual retirement age of 70 — Whether "normal retiring age" — Employment Rights Act 1996, s 109(1)(a)(i) **Wall v British Compressed Air Society,** CA [2004] ICR 408

Work outside Great Britain *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Jurisdiction*

Overseas security officer employed by foreign office working almost exclusively abroad — Whether tribunal having jurisdiction to hear unfair dismissal complaint — Whether acceptance of jurisdiction determinative of Great Britain as place employed for purposes of redundancy — Employment Rights Act 1996, ss 139(1), 196 **Pitman v Foreign and Commonwealth Office,** EAT [2003] ICR 699

Pilots employed by Hong Kong company required by contracts of employment to be based in Great Britain — Whether in employment in Great Britain — Whether employment tribunal jurisdiction to hear unfair dismissal claims — Whether appropriate forum for breach of contract claims — Employment Rights Act 1996, s 94(1) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 10(2)(h) **Crofts v Cathay Pacific Airways Ltd,** CA [2005] ICR 1436

Security supervisor employed by English company to work in United Kingdom overseas territory — Whether employment tribunal having jurisdiction to hear complaint of unfair dismissal — Employment Rights Act 1996, ss 94(1), 244(1) **Lawson v Serco Ltd,** CA [2004] ICR 204

Pregnancy

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Reasonableness of dismissal—continued

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Employer changing shift arrangements to include Sunday working following need to increase production — Employee unwilling to work Sundays on religious grounds rejecting alternative positions — Whether dismissal fair — Whether right to manifest religion engaged — Employment Rights Act 1996, s 98(1)(4) — Human Rights Act 1998, Sch 1, Pt 1, art 9
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Probation officer performing at fetish clubs and involved with sale of bondage products on internet — Whether within right to respect for private life — Whether dismissal fair — Employment Rights Act 1996, s 98(4) — Human Rights Act 1998, Sch 1, Pt I, arts 8, 10
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Employer declaring non-contractual bonus — Conditions imposed for payment in monthly instalments and to withhold payment in event of notice to terminate employment — Employee resigning — Whether constructive dismissal — Employer withholding bonus — Whether bonus "wages" unlawfully deducted — Employment Rights Act 1996, ss 13, 27(3)
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Walton v Independent Living Organisation Ltd, EAT [2002] ICR 1406
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EMPLOYMENT—*continued*

Wages—*continued*

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Sub-postmaster providing premises equipment and staff — No obligation to attend personally — Whether performing "personally any work or services" — Whether Post Office "client or customer" — Whether sub-postmaster "worker" — Whether "home worker" — Whether "employee" — Employment Rights Act 1996, s 230(1)(3) — National Minimum Wage Act 1998, ss 35(2), 54(3) — Working Time Regulations 1998, reg 2(1)
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Working time provisions

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Employee contracted to work 39-hour week with overtime if required — Employee's hours averaging 58 per week — Payment for annual leave based on 39-hour week — Whether payment at "rate of a week's pay" — Employment Rights Act 1996, ss 221, 234 — Working Time Regulations 1998, reg 16 — Council Directive 93/104/EC, art 7
Bamsey v Albon Engineering and Manufacturing plc, EAT [2003] ICR 1224
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Paper boy aged 15 claiming holiday pay — Whether "worker" — Whether entitled to paid leave — Children and Young Persons Act 1933, ss 18 (as amended by Children (Protection at Work) Regulations 1998, reg 2), 30(1) — Working Time Regulations 1998, regs 2(1), 13 — Council Directive 94/33/EC, art 11 **Addison (trading as Brayton News) v Ashby,** EAT [2003] ICR 667

Waitress with no regular hours working as required — Whether continuously employed for 13 weeks — Whether entitled to annual leave — Working Time Regulations 1998, reg 13(7)(8)
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Activities connected with provision of meals to aircraft between flights — Whether involving "need for continuity of service" — Whether routine increase in activity "surge of activity" — Whether rest break provision excluded — Whether period when employees not doing work but at employer's disposal "rest break" — Working Time Regulations 1998, regs 12(1)(3), 21(c)(d)
Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services), EAT [2004] ICR 1489
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Collective agreement providing arbitration for disputes — Local agreement for shift system expressly excluding statutory regulation of rest periods — Arbitration award in favour of employers' proposals for new system — Whether award "collective agreement" — Whether statutory regulation of rest periods excluded — Trade Union and Labour Relations (Consolidation) Act 1992, s 178 — Working Time Regulations 1998, regs 2(1), 10(1), 23
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On-call duty by hospital doctors — Doctors permitted to sleep at hospital during periods of inactivity — Whether totality of on-call time "working time" — Derogations from minimum daily rest periods — Requirements to be met by compensatory rest periods — Council Directive 93/104/EC, arts 2(1), 3, 17(2) **Landeshauptstadt Kiel v Jaeger (Case C-151/02),** ECJ [2004] ICR 1528

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Paid annual leave

Claims for payment in respect of entitlement in two leave years — Whether failures to pay "series of deductions" — Whether claim in respect of earlier period out of time — Employee taking fewer days leave than entitlement — Whether entitled to payment for full entitlement — Employment Rights Act 1996, ss 23(2)(3), 27(1) — Working Time Regulations 1998, regs 13(1)(9), 16(1), 30(2) **List Design Group Ltd v Douglas,** EAT [2002] ICR 686

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Paid annual leave—continued

Employee absent from work through sickness — Whether entitled to paid annual leave during period of absence — Whether holiday pay recoverable as unlawful deduction of wages — Employment Rights Act 1996, ss 13, 23, 205(2) — Working Time Regulations 1998, regs 13, 14 (as amended by Working Time (Amendment) Regulations 2001, reg 2), 30
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Employee's hourly rate of pay including element of holiday pay — Whether void — Whether employer entitled to set-off — Working Time Regulations 1998, regs 13(9)(b), 16(1)(5), 35(1) — Council Directive 93/104/EC, art 7 **MPB Structures Ltd v Munro,** Ct of Sess [2004] ICR 430

Employees' hourly rate of pay including element of holiday pay — Whether void — Whether employers entitled to set-off — Working Time Regulations 1998, regs 13(9)(b), 16(1)(5), 35(1)
Marshalls Clay Products Ltd v Caulfield, EAT [2004] ICR 436

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Entitlement to paid annual leave conditional on minimum period of continuous employment — Whether contrary to Community law — Working Time Regulations 1998, reg 13(7) — Council Directive 93/104/EC, art 7(1)
R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99), ECJ [2001] ICR 1152

Worker

Individual building worker providing his services under subcontract — Specific condition for subcontractor to provide sufficient labour to maintain work in progress — Whether performing "personally . . . work or services" — Working Time Regulations 1998, reg 2(1)(b)
Redrow Homes (Yorkshire) Ltd v Wright, CA [2004] ICR 1126

Individual building worker providing his services under subcontract — Whether performing "personally . . . work or services" — Whether carrying on "business undertaking" — Whether "worker" — Working Time Regulations 1998, reg 2(1)(b)
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Wrongful dismissal

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Employee awarded compensation for unfair dismissal — Subsequent claim of wrongful dismissal based on manner of dismissal — Whether damages recoverable **Johnson v Unisys Ltd,** HL(E) [2001] ICR 480

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Wrongful dismissal—*continued*

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Employee with 11 months' service summarily dismissed in breach of employers' disciplinary procedure — Breach depriving employee of right to claim unfair dismissal — Whether damages recoverable for lost chance — Whether damages recoverable for loss of opportunity to remain in employment **Wise Group v Mitchell**, EAT [2005] ICR 896

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Per rem judicatam

Cause of action estoppel

Applicant withdrawing employment tribunal complaint with intention of replacing it with fresh complaint — Complaint dismissed "on withdrawal" — Applicant presenting second complaint on same facts against original and second respondent — Whether estopped from pursuing second complaint **Ako v Rothschild Asset Management Ltd**, CA [2002] ICR 899

Issue estoppel

Employee's disagreement with employer over safety procedures disrupting working relationship — Employee dismissed — Complaint of unfair dismissal on procedural grounds upheld — Industrial tribunal awarding no compensation on ground of employee's 100% contribution to dismissal — Employee's action for malicious falsehood and breach of contract against employer raising safety issue — Whether action barred by issue estoppel
Friend v Civil Aviation Authority, CA [2002] ICR 525

EUROPEAN COMMUNITY

Council Directive

Implementation

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Free competition

Restriction or distortion of competition

Compulsory affiliation to sectoral pension scheme established by collective agreement — Pension fund having exclusive right to manage scheme — Whether fund "undertaking" — Whether infringing Community competition law — EC Treaty, arts 3(g), 5, 85, 86, 90
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Parallel imports of medicinal products into member state by wholesalers in other states — Manufacturer's restriction of deliveries to wholesalers — Allegation of export ban by manufacturer — Whether wholesalers acquiescing in manufacturer's conduct by maintaining commercial relations — EC Treaty, art 85(1)
Bayer v Commission of the European Communities (Case T-41/96), CFI [2001] ICR 735

Services

National obligations imposed on construction industry employers — Requirements as to minimum wage, other remuneration and labour documents — Whether enforceable against undertaking established in another member state doing temporary work in host state — Whether material that obligations imposed by public order legislation — EC Treaty, arts 59, 60
Criminal proceedings against Arblade (Case C-369 and 376/96), ECJ [2001] ICR 434

Freedom of establishment

Profession

Application to carry on professional activity in another member state — Authorisation refused because applicant's diploma not within Directive on mutual recognition of diplomas and certificates — Whether obligation to consider and evaluate applicant's qualifications and experience — EC Treaty, art 43 EC (formerly art 52)
Conseil National de l'Ordre des Architectes v Dreessen (Case C-31/00), ECJ [2002] ICR 1227

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Freedom of movement

Citizenship of European Union

Unemployment benefit for persons seeking first employment — National refused benefit on ground that secondary education completed in another member state — Whether unlawful as contrary to right of free movement — EC Treaty, art 8a(1) (art 18(1) EC)
D'Hoop v Office national de l'emploi (Case C-224/98), ECJ [2004] ICR 137

Rights of entry and residence

Children of migrant worker — Right of continued residence for educational purposes following divorce or termination of worker status — Whether primary parent carer having derived right of residence — Whether European Union citizen having right of residence regardless of worker status — EC Treaty, art 18(1) EC — Council Directive 90/364/EEC, art 1(1) — Council Regulation (EEC) No 1612/68, art 12
Baumbast v Secretary of State for the Home Department (Case C-413/99), ECJ [2003] ICR 1347

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Equal treatment provisions for men and women

Children residing with father for part of each week — Mother receiving child benefit — Father's jobseeker's allowance not including amount for children — Entitlement dependent on receipt of child benefit — Whether discriminatory — Whether jobseeker's allowance providing protection against risk of unemployment — Jobseekers Act 1995, ss 1, 3 — Jobseeker's Allowance Regulations 1996, regs 77(1), 83(b) — Council Directive 79/7/EEC, art 3(1)
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Free movement of workers

Jobseeker's allowance — Entitlement dependent on applicant being "worker" or having right of residence under Community enactments or having habitual residence — Eligibility of person seeking employment in United Kingdom after brief employment there many years previously — Whether "worker" — Whether having right of residence — Whether habitual residence condition contrary to non-discrimination principle — Jobseeker's Allowance Regulations 1996, reg 85(4) — EC Treaty, art 48(2) (after amendment, art 39(2) EC) — Council Directive 68/360/EEC, arts 4, 8 — Council Regulation (EEC) No 1612/68 (as amended), art 7(2)
Collins v Secretary of State for Work and Pensions (Case C-138/02), ECJ [2005] ICR 37

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Subsistence allowance payable to resident non-national only if worker — Application by resident non-national student refused — Whether discrimination contrary to Community law — Effect of citizenship of European Union — EC Treaty, arts 6, 8, 8a — Council Directive 93/96/EEC, art 1 **Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve (Case C-184/99),** ECJ [2002] ICR 566

FACTORY

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Protection

Employee mixing for one hour weekly asbestos flock to apply to presses — Whether process to which regulations applicable — Whether carried on "occasionally only" — Asbestos Industry Regulations 1931, reg 2 **Jeromson v Shell Tankers (UK) Ltd,** CA [2001] ICR 1223

HEALTH AND SAFETY

Employer's duty

Hazardous substances

Employee developing allergy from using powdered latex gloves — Employer supplying vinyl gloves following serious reaction — Employee later suffering anaphylactic shock from inadvertent contact with latex — Whether absolute duty on employer to prevent or control exposure to substance hazardous to health — Control of Substances Hazardous to Health Regulations 1988, reg 7(1)(7) — Control of Substances Hazardous to Health Regulations 1994, reg 7(1)(11) **Dugmore v Swansea NHS Trust,** CA [2003] ICR 574

Manual handling operations

Ambulance technician injured carrying patient downstairs — Use of fire brigade to remove patient through window only alternative — Whether "appropriate" measure to reduce risk to ambulance crew — Manual Handling Operations Regulations 1992, reg 4(1) — Council Directive 90/269/EEC, art 3 **King v Sussex Ambulance Service NHS Trust,** CA [2002] ICR 1413

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Employer's duty—*continued*

Manual handling operations—continued

Claimant employed by cleaning company to work at bus station — Claimant slipping while spreading grit over ice-covered yard — Whether manual handling operation — Whether employer in breach of duty to avoid risk of injury — Whether bus company having any control over claimant's workplace and requirement to keep free from ice — Manual Handling Operations Regulations 1992, regs 2, 4(1) — Workplace (Health, Safety and Welfare) Regulations 1992, regs 4, 12(3) **King v RCO Support Services Ltd,** CA [2001] ICR 608

Employer failing to train employee in accordance with programme designed to increase awareness of risk in manual handling — Employee carrying load injured twisting in response to call from colleague — Whether employer in breach of duty to take appropriate steps to reduce risk of injury to lowest level reasonably practicable — Manual Handling Operations Regulations 1992, reg 4(1) **O'Neill v DSG Retail Ltd,** CA [2003] ICR 222

Employer's liability

Personal protective equipment

Claimant injured when scaffolding tower provided by employer upset by deliberate act of fellow employee — Whether employer's duty to provide suitable and stable equipment to be assessed by reference to foreseeable risks — Whether tower safe "for any person at work there" — Provision and Use of Work Equipment Regulations 1992, regs 5, 20 — Construction (Health, Safety and Welfare) Regulations 1996, reg 5 **Horton v Taplin Contracts Ltd,** CA [2003] ICR 179

Safety boots provided to protect employee against injury from heavy, sharp or hard objects — Employee suffering frostbite while working outside in extreme weather conditions — Whether breach of statutory duty — Personal Protective Equipment at Work Regulations 1992, reg 7(1)
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Woodworking machinery

Refugee with language difficulties misrepresenting experience — Employed as circular saw operator — Injured three weeks later operating saw from wrong position — Whether insufficiently instructed and supervised — Whether breach of statutory duty — Whether employer negligent — Woodworking Machines Regulations 1974, regs 5(1), 13, 16(3)
Tasci v Pekalp of London Ltd, CA [2001] ICR 633

Work equipment

Mechanic employed by first defendant working on van owned by second defendant — Wheel bolt shearing causing mechanic to sustain injury — Whether "work equipment" — Whether defendants liable for failure to maintain work equipment — Provision and Use of Work Equipment Regulations 1992, regs 2(1), 6(1) **Hammond v Comr of Police of the Metropolis,** CA [2004] ICR 1467

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Employee injured tripping over frame stored with feet protruding — Employer in breach of statutory duty — Whether finding of 90% contributory negligence sustainable — Law Reform (Contributory Negligence) Act 1945, s 1(1) — Workplace (Health, Safety and Welfare) Regulations 1992, reg 12(3) **Anderson v Newham College of Further Education,** CA [2003] ICR 212

Inspector

Powers

Inspector submitting written questions to health and safety manager of company under investigation — Whether inspector's powers limited to face to face questioning — Health and Safety at Work etc Act 1974, s 20(2)(j)
R (Wandsworth London Borough Council) v South Western Magistrates' Court, DC [2003] ICR 1287

Prohibition notice

Activities

Notice following major accident prohibiting provision of railway infrastructure — Infrastructure not in use following accident save for recovery operations — Whether "activities" being carried on — Whether power to issue prohibition notice while activities temporarily interrupted — Health and Safety at Work etc Act 1974, s 22 (as amended by Consumer Protection Act 1987, Sch 3, para 2) **Railtrack plc v Smallwood,** Sullivan J [2001] ICR 714

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Burden of proof

Employer's duty not to expose non employees to risk to health or safety — Burden of showing not reasonably practicable to do more on employer — Whether compatible with presumption of innocence — Health and Safety at Work etc Act 1974, ss 3(1), 33(1)(a), 40 — Human Rights Act 1998, Sch 1, Pt I, art 6(2) **R v Davies (David Janway),** CA [2003] ICR 586

HEALTH AND SAFETY—*continued*

Statutory offence—*continued*

Manufacturer

Machinery causing fatality — Modification made following prohibition notice — Whether Health and Safety Executive required to comply with Community provision for machinery liable to endanger safety before prosecuting — Whether appropriate to prosecute under 1974 Act when Regulations providing for specific offence — Health and Safety at Work etc Act 1974, s 6 (as amended by Consumer Protection Act 1987, s 36, Sch 3, para 2) — Interpretation Act 1978, s 18 — Supply of Machinery (Safety) Regulations 1992, reg 29, Sch 6, para 7 — Council Directive 98/37/EC, art 7 **R (Junttan Oy) v Bristol Magistrates' Court,** DC [2002] ICR 1523
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Right to respect for private life

Commercial documents see Competition: **Investigatory powers:** *Compatibility with Convention rights*

INDUSTRIAL RELATIONS

Employment Appeal Tribunal

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Appeal tribunal dismissing appeal on ex parte preliminary hearing — Court of Appeal finding grounds of appeal having some prospect of success — Whether appropriate to remit for full appeal tribunal hearing **Lambe v 186K Ltd,** CA [2005] ICR 307

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Appeal documents sent by fax on last day for entering appeal — Whether transmission to be completed by 4 p m **Woodward v Abbey National plc (No 2),** EAT [2005] ICR 1702

Appeal solely on ground of unreasonable delay in promulgation of employment tribunal's decision — Whether constituting independent ground of appeal — Whether limitation of appeal to questions of law incompatible with right to fair hearing — Employment Tribunals Act 1996, s 21(1) — Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 6(1) **Connex South Eastern Ltd v Bangs,** CA [2005] ICR 763

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Party appealing more than 42 days after employment tribunal sending decision — Whether time running from date decision sent or date received — Whether out of time — Whether extension to be granted — Employment Appeal Tribunal Rules 1993, Sch 1, r 3(3) (as substituted by Employment Appeal Tribunal (Amendment) Rules 2001, r 3) **Sian v Abbey National plc,** EAT [2004] ICR 55

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Employment Appeal Tribunal—*continued*

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HL(E) [2003] ICR 856

Constitution

Parties consenting to hearing of appeal by judge and one appointed member — Appellant employee withdrawing consent on discovering appointed member employers' representative — Whether consent valid — Whether appeal tribunal having jurisdiction to continue — Employment Tribunals Act 1996, s 28(2)(3) **de Haney v Brent MIND,** CA [2004] ICR 348

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Tran v Greenwich Vietnam Community Project, CA [2002] ICR 1101

Compatibility of disability discrimination provision with complainant's human rights — Whether appeal tribunal "court" for purpose of determining compatibility — Disability Discrimination Act 1995, s 7(1) (as amended by Disability Discrimination (Exception for Small Employers) Order 1998, art 2) — Human Rights Act 1998, s 4(5)
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Appeals and interim applications — Inspection of register — Documents for use at hearing — Evidence — Case management — Complaints about tribunal hearings — Skeleton arguments — Citation of authorities — Disposal of appeals by consent — Failure to present response — Hearings — Delivery of judgments — Costs — Review — Appeals from appeal tribunal — Employment Appeal Tribunal Rules 1993 (as amended by Employment Appeal Tribunal (Amendment) Rules 2001 and Employment Appeal Tribunal (Amendment) Rules 2004)
Practice Direction (Employment Appeal Tribunal: Procedure) 2004, EAT [2005] ICR 637

Appeals and interlocutory applications — Inspection of register — Documents for use at hearing — Evidence — Case management — Complaints about tribunal hearings — Skeleton arguments — Citation of authorities — Disposal of appeals by consent — Failure to give notice of appearance — Delivery of judgments — Costs — Appeals from appeal tribunal — Employment Appeal Tribunal Rules 1993 (as amended by Employment Appeal Tribunal (Amendment) Rules 2001)
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Hearing of unfair dismissal complaint — No attendance by applicant employee with solicitors on record — Whether tribunal required to make inquiries — Tribunal dismissing complaint without contacting solicitors — Whether review to be granted — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, rr 11(3), 13(5)
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Inadequate reasons for employment tribunal decision — Appeal tribunal adjourning appeal and remitting to tribunal for clarification — Whether appropriate — Employment Tribunals Act 1996, s 35(1)(b) **Burns v Royal Mail Group plc (formerly Consignia plc),** EAT [2004] ICR 1103

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TRADE DISPUTE

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Ballot

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Council employees working in assessment and advice unit — Proposal to contract out unit's services to private company — Union balloting members "to persuade council to retain [employees] within its employment" — Whether trade dispute — Union's notice enabling employer to identify 45 employees involved — Whether notice satisfying requirement as to category of employee — Trade Union and Labour Relations (Consolidation) Act 1992, ss 219(1), 226A(2)(c)(3A) (as inserted by Trade Union and Employment Rights Act 1993, s 18(2) and amended by Employment Relations Act 1999, Sch 3, para 3), 244(1)
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TRADE UNION

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Ballot conducted by qualified independent person — Result notified to committee — Union complaining some employees not receiving ballot papers — Whether committee having jurisdiction to order re-run of ballot — Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, para 29 (as inserted by Employment Relations Act 1999, s 1(3), Sch 1)
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R (British Broadcasting Corpn) v Central Arbitration Committee, Moses J [2003] ICR 1542

Shop stewards

Authority of

Shop steward of closed shop negotiating variation of employment contract — Signed agreement returned to employers 2 months later — Employee subsequently claiming workforce not consulted — Whether shop steward having authority to bind employees to their detriment
Harris v Richard Lawson Autologistics Ltd, CA [2002] ICR 765

TRIBUNAL

Police disciplinary board

Immunity from suit

Civilian employee alleging sexual assault by police inspector — Disciplinary board appointed — Complaint by employee of sex discrimination by board in conduct of proceedings — Whether board's proceedings immune — Whether employment tribunal jurisdiction to hear complaint — Police (Discipline) Regulations 1985, regs 18, 23, 24 — European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 6, 8
Heath v Comr of Police of the Metropolis, CA [2005] ICR 329

Statutory

Care Standards Tribunal

Statutory inquiry into child's death finding social worker guilty of misconduct — Social worker placed on list of those unsuitable to work with children — Appeal to Care Standards Tribunal — Whether tribunal bound by findings of statutory inquiry — Protection of Children Act 1999, s 4(1)(3) **Secretary of State for Education and Skills v Mairs,** Leveson J [2005] ICR 1714

TRUSTS

Pension scheme

Maladministration

Council making long service award enhancing employee's pension — Whether lawful — Council subsequently refusing to pay enhanced element of pension following advice award unlawful — Whether maladministration **Barking and Dagenham London Borough Council v Watts,** Jacob J [2003] ICR 1059

Pensions Ombudsman

Costs of appeal — Trustee and insurer of scheme both appealing against decision of ombudsman — Trustee and insurer separately represented — Ombudsman appearing by counsel at hearing of appeal to defend determination — Appeal allowed — Extent of ombudsman's liability in costs — Whether parties separately appearing in same interest both entitled to costs — Whether trustee or insurer to be awarded costs
Moore's (Wallisdown) Ltd v Pensions Ombudsman, Ferris J [2002] ICR 773

TRUSTS—*continued*

Pension scheme—*continued*

Pensions Ombudsman—continued

Insurance company making payments to trustees of pension scheme against company for partial surrender of policy forming part of scheme assets — Complaint of maladministration against company — Whether company "concerned with the . . . administration of . . . the scheme" — Whether jurisdiction to entertain complaint — Pension Schemes Act 1993, s 146(4)(b) (as substituted by Pensions Act 1995, s 157) — Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, regs 1(2), 2(1)
R (Britannic Asset Management Ltd) v Pensions Ombudsman, CA [2003] ICR 99

Short service benefit

Trustee calculating benefit on basis scheme members having uniform retirement age — Actuarial reduction applied to benefit of members with contractual retirement age below uniform age — Whether practice lawful — Pension Schemes Act 1993, ss 71(1)(2)(3), 72(1), 74(1), 180
Universities Superannuation Scheme Ltd v Simpson, Lloyd J [2004] ICR 1426

Surplus fund

Occupational pension scheme providing for regular actuarial valuations — Scheme requiring employer to make arrangements to deal with actuarial surplus — Employer using part of surplus to offset existing accrued liabilities to make contributions — Whether permissible — Pensions Act 1995, s 37(1)(2) **National Grid Co plc v Mayes,** HL(E) [2001] ICR 544

Scheme for employees of non-associated employers divided into sections each covering one employer — Some sections in surplus and some in deficit — Proposal for payments to employers of sections in surplus after making statutory provision for members in employer's section — Whether each section "qualifying scheme" for purposes of such provision — Whether statutory provision required for all members of scheme before any payments to employers — Winding up begun prior to commencement of new statutory regime — Whether trustee to comply with notice provisions of new regime — Pension Schemes Act 1993, ss 102(2), 108 — Pensions Act 1995, s 76 — Pensions Act 1995 (Commencement No 10) Order 1997, art 6 **BEC Pension Trustee Ltd v Sheppeck,** Etherton J [2002] ICR 1343

Underprovision

Employer giving trustees notice to terminate scheme — Trustees' power to order company to pay "appropriate" contribution — Whether exercisable during notice period to make good shortfall **Capital Cranfield Trustees Ltd v Pinsent Curtis,** CA [2005] ICR 1767

Valuation showing significant shortfall — Employers unable to meet statutory debt owed for shortfall — Whether permissible for trustee to compromise debt — Trustee Act 1925, s 15 — Pensions Act 1995, ss 60, 75
Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc, Charles Aldous QC [2002] ICR 1427

Variation

Proposal for transfer of accrued rights to another scheme without members' consent on employer's withdrawal from scheme — Whether permissible — Pensions Act 1995, s 67(2) — Occupational Pension Schemes (Preservation of Benefits) Regulations 1991, reg 12(2)
Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers, Blackburne J [2002] ICR 359

VICARIOUS LIABILITY

Employment

Course of employment

Doorman at nightclub engaging in violent incident with customers and leaving premises after being attacked — Claimant stabbed by doorman returning to club's vicinity and seeking revenge — Whether club owner vicariously liable — Whether sufficient connection between act of stabbing and work doorman employed to do
Mattis v Pollock (trading as Flamingos Nightclub), CA [2003] ICR 1335

Warden of school boarding house sexually abusing residents — Whether employers vicariously liable — Whether sufficient connection between acts of abuse and work warden employed to do **Lister v Hesley Hall Ltd,** HL(E) [2001] ICR 665

Harassment

Employee complaining of harassment by departmental manager in breach of statutory duty — Whether employer vicariously liable — Protection from Harassment Act 1997, ss 1, 3
Majrowski v Guy's and St Thomas's NHS Trust, CA [2005] ICR 977

Police

Assault

Off-duty constable assaulting claimant and locking him in police van — Whether assault committed in purported performance of functions as constable — Whether chief constable vicariously liable — Police Act 1996, s 88 **Weir v Chief Constable of Merseyside Police,** CA [2003] ICR 708

VICARIOUS LIABILITY—*continued*

Victimisation

Race

Applicant's complaint against employer of racial discrimination — Employer refusing to provide reference while complaint pending — Complaint of victimisation — Appropriate comparator — Whether refusal "by reason that" applicant had made complaint — Race Relations Act 1976, s 2(1)(a) **Chief Constable of the West Yorkshire Police v Khan,** HL(E) [2001] ICR 1065

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"*Act done by*"—Sex Discrimination Act 1975, s 17(1)(a) **Chief Constable of Cumbria Police v McGlennon,** EAT [2002] ICR 1156

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"*Agreement*"—EC Treaty, art 85(1) **Bayer AG v Commission of the European Communities (Case T-41/96),** CFI [2001] ICR 735

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"*All claims*"—Contract **University of East London v Hinton,** CA [2005] ICR 1260

"*Already in force*"—Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, para 35 (as inserted) **R (National Union of Journalists) v Central Arbitration Committee,** Hodge J [2005] ICR 493

"*Amount of work done*"—Employment Rights Act 1996, s 221 **Evans v The Malley Organisation (trading as First Business Support),** CA [2003] ICR 432

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"*By dismissing*"—Disability Discrimination Act 1995, s 4(2)(d) **Comr of Police of the Metropolis v Harley,** EAT [2001] ICR 927

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"*Client or customer*"—Employment Rights Act 1996, s 230(3) **Wolstenholme v Post Office Ltd,** EAT [2003] ICR 546

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"*Independent and impartial*"—Convention for the Protection of Human Right and Fundamental Freedoms, art 6(1) **Scanfuture (UK) Ltd v Secretary of State for Trade and Industry,** EAT [2001] ICR 1096

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"*Personally to execute any work or labour*"—Race Relations Act 1976, s 78(1) **Mingeley v Pennock (trading as Amber Cars),** CA [2004] ICR 727

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Age Concern Scotland v Hines [1983] IRLR 477, EAT (Sc). **Overruled,** *Wall v British Compressed Air Society* [2004] ICR 408, CA

Aid, The (1881) 6 PD 84. **Considered,** *Ahmed v Governing Body of the University of Oxford* [2003] ICR 733, CA

Airbus Industrie GIE v Patel [1999] 1 AC 119; [1998] 2 WLR 686; [1998] 2 All ER 257, HL(E). **Applied,** *Turner v Grovit* [2002] ICR 94, HL(E)

Alabaster v Woolwich plc [2000] ICR 1037, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 1246, CA

Alabaster v Woolwich plc (Case C-147/02) [2005] ICR 695, para 46, ECJ. **Dicta applied,** *Hoyland v Asda Stores Ltd* [2005] ICR 1235, EAT(Sc)

Alderson v Secretary of State for Trade and Industry [2003] EWHC 452 (Admin). **Decision of Newman J affirmed** [2004] ICR 512, CA

Alexander v Standard Telephones & Cables Ltd (No 2) [1991] IRLR 286, para 31. **Dicta of Hobhouse J approved,** *Kaur v MG Rover Group Ltd* [2005] ICR 625, CA

Ali v McDonagh [2002] ICR 1026, CA. **Applied,** *Carter v Ahsan* [2004] ICR 938, EAT; [2005] ICR 1817, CA

Allen v Amalgamated Construction Co Ltd (Case C-234/98) [2000] ICR 436; [1999] ECR I-8643, ECJ. **Applied,** *Mayeur v Association Promotion de l'Information Messine (APIM)* (Case C-175/99) [2002] ICR 1316, ECJ

Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602; [1995] 4 All ER 907, CA. **Distinguished,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA

Allsop v North Tyneside Metropolitan Borough Council [1992] ICR 639, CA. **Distinguished,** *Nicholls v Greenwich London Borough Council* [2003] ICR 1020, CA

Aniagwu v Hackney London Borough Council [1999] IRLR 303, EAT. **Considered,** *Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA

Anya v University of Oxford [2001] ICR 847, CA. **Distinguished,** *Miriki v General Council of the Bar* [2002] ICR 505, CA

Anyanwu v South Bank Student Union (Commission for Racial Equality intervening) [2000] ICR 221, CA. **Decision of the Court of Appeal reversed** [2001] ICR 391, HL(E)

Anyanwu v South Bank Student Union (Commission for Racial Equality intervening) [2001] ICR 391; [2001] 1 WLR 638, HL(E). **Applied,** *Hallam v Avery* [2001] ICR 408, HL(E)

Archibald v Fife Council [2004] IRLR 197, Ct of Sess. **Decision of the Inner House of the Court of Session reversed** [2004] ICR 954, HL(Sc)

Ashmore v British Coal Corpn [1990] ICR 485; [1990] 2 QB 338; [1990] 2 WLR 1437; [1990] 2 All ER 981, CA. **Applied,** *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646, CA

Aspden v Webbs Poultry and Meat Group (Holdings) Ltd [1996] IRLR 521. **Considered,** *Jenvey v Australian Broadcasting Corpn* [2003] ICR 79

Associated Newspapers Ltd v Wilson [1995] ICR 406; [1995] 2 AC 454; [1995] 2 WLR 354; [1995] 2 All ER 100, HL(E). **Considered,** *Southwark London Borough Council v Whillier* [2001] ICR 142, EAT; [2001] ICR 1016, CA

Aziz v Trinity Street Taxis Ltd [1988] ICR 534; [1989] QB 463; [1988] 3 WLR 79; [1988] 2 All ER 860, CA. **Applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

BG plc v O'Brien [2001] IRLR 496, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 721, CA

Baccus SRL v Servicio Nacional del Trigo [1957] 1 QB 438; [1956] 3 WLR 948; [1956] 3 All ER 715, CA. **Applied,** *Republic of Yemen v Aziz* [2005] ICR 1391, CA

Badeck, Proceedings on an application by (Case C-158/97) [2000] ECR I-1875, ECJ. **Considered,** *Abrahamsson v Fogelqvist* (Case C-407/98) [2002] ICR 932, ECJ

Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA. **Distinguished,** *Hanly v Norinchukin International plc* [2003] ICR 1416, EAT

Bamsey v Albon Engineering and Manufacturing plc [2003] ICR 1224, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2004] ICR 1083, CA

Bank of Credit and Commerce International SA v Ali [2000] ICR 1410, CA. **Decision of the Court of Appeal affirmed** [2001] ICR 337, HL(E)

Bank of Credit and Commerce International SA v Ali (No 2) [2000] ICR 1354; [1999] 4 All ER 83. **Decision of Lightman J affirmed** [2002] ICR 1258, CA

Banks v Chief Adjudication Officer [2000] 1 All ER 686, CA. **Decision of the Court of Appeal affirmed** [2001] ICR 877, HL(E)

Banks v Tesco Stores Ltd [1999] ICR 1141, EAT. **Considered,** *Fletcher v NHS Pensions Agency* [2005] ICR 1458, EAT

Banks v Woodhall Duckham Ltd (unreported) 30 November 1995; Court of Appeal (Civil Division) Transcript No 1789 of 1995, CA. **Not followed,** *Jeromson v Shell Tankers (UK) Ltd* [2001] ICR 1223, CA

Barber v Guardian Royal Exchange Assurance Group (Case C-262/88) [1990] ICR 616, 668, 671, paras 12, 34; [1991] 1 QB 344; [1991] 2 WLR 72; [1990] ECR I-1889; [1990] 2 All ER 660, ECJ. **Applied,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT; [2002] ICR 602, CA. **Dicta applied,** *Jämställdhetsombudsmannen v Örebro Läns Landsting* (Case C-236/98) [2001] ICR 249, ECJ

Barber v Somerset County Council [2002] ICR 613; [2002] 2 All ER 1, CA. **Decision of the Court of Appeal reversed** [2004] ICR 457, HL(E)

Barber v Somerset Council [2004] ICR 457, paras 5 and 65; [2004] 1 WLR 1089; [2004] 2 All ER 385, HL(E). **Dicta of Lord Scott of Foscote and Lord Walker of Gestingthorpe considered,** *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] ICR 782, CA

Barclays Bank v Kapur (No 2) [1995] IRLR 87, EAT. **Considered,** *Lord Chancellor v Coker* [2001] ICR 507, EAT

Barnes v Leavesley [2001] ICR 38, EAT. **Considered,** *Rose v Dodd* [2005] ICR 1776, CA

Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT. **Guidance approved,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA. **Considered,** *University of Huddersfield v Wolff* [2004] ICR 828, EAT; *Chamberlin v Emokpae* [2004] ICR 1476, EAT

Bayer AG v Commission of the European Communities (Cases C-2/01P and C-3/01P) [2001] ICR 735, CFI. **Decision of the Court of First Instance affirmed** [2005] ICR 834, ECJ

Bazley v Curry (1999) 174 DLR (4th) 45. **Applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Beckham v Drake (1849) 2 HL Cas 579, HL(E). **Considered,** *Grady v Prison Service* [2003] ICR 753, EAT and CA

Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00) [2003] ICR 50; [2002] ECR I-4893, ECJ. **Considered,** *Martin v South Bank University* (Case C-04/01) [2004] ICR 1234, ECJ

Beedell v West Ferry Printers Ltd [2000] ICR 1263, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 962, CA

Bell v Lever Bros Ltd [1932] AC 161, HL(E). **Distinguished,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Bellinger v Bellinger (Lord Chancellor intervening) [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593, HL(E). **Considered,** *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, CA. **Distinguished,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] ICR 806, HL(E)

Bernadone v Pall Mall Services Group Ltd [1999] IRLR 617. **Decision of Blofeld J affirmed** [2001] ICR 197, CA

Bernard v Attorney General of Jamaica [2005] IRLR 398, para 18, PC. **Dicta of Lord Steyn applied,** *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA

Berriman v Delabole Slate Ltd [1985] ICR 546, 549, CA. **Dicta of Browne-Wilkinson LJ explained,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Beynon v Scadden [1999] IRLR 700, EAT. **Considered,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Bhanot v South West London & St George's Mental Health NHS Trust [2000] Lloyd's Rep Med 324. **Considered,** *Saeed v Royal Wolverhampton Hospitals NHS Trust* [2001] ICR 903, CA; *Skidmore v Dartford and Gravesham NHS Trust* [2001] ICR 911, EAT

Bilka-Kaufhaus GmbH v Weber von Hartz (Case 170/84) [1987] ICR 110; [1986] ECR 1607, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 3)* [2004] ICR 993; *Health and Safety Executive v Cadman* [2005] ICR 1546, CA

Bilton v Fastnet Highlands Ltd 1998 SLT 1323, 1326. **Dicta approved,** *Dugmore v Swansea NHS Trust* [2003] ICR 574, CA

Birmingham Midshires Building Society v Horton [1991] ICR 648, EAT. **Approved,** *Consignia plc (formerly The Post Office) v Sealy* [2002] ICR 1193, CA

Blackpool Corpn v Locker [1948] 1 KB 349; [1948] 1 All ER 85, CA. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Boddington v British Transport Police [1999] 2 AC 143; [1998] 2 WLR 639; [1998] 2 All ER 203, HL(E). **Applied,** *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, CA

Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 Ch D 339, CA. **Distinguished,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Boyle v Kodak Ltd [1969] 1 WLR 661; [1969] 2 All ER 439, HL(E). **Applied,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Boys and Girls Welfare Society v Macdonald [1997] ICR 693, EAT. **Considered,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA

British Broadcasting Corpn v Hearn [1977] ICR 685; [1977] 1 WLR 1004; [1978] 1 All ER 111, CA. **Considered,** *P v National Association of School Masters/Union of Women Teachers* [2001] ICR 1241, CA; [2003] ICR 386, HL(E)

British Coal Corpn v British Coal Staff Superannuation Scheme Trustees Ltd [1994] ICR 537; [1995] 1 All ER 912. **Overruled,** *National Grid Co plc v Mayes* [2001] ICR 544, HL(E)

British Gas Services Ltd v McCaull [2001] IRLR 60, EAT. **Followed,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

British Nursing Association v Inland Revenue [2001] IRLR 659, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 19, CA

British Telecommunications plc v Williams [1997] IRLR 668, EAT. **Disapproved,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

Bronner (Oscar) GmbH & Co KG v Mediaprint Zeitungs -und Zeitschriftenverlag GmbH & Co KG (Case C-7/97) [1998] ECR I-7791, ECJ. **Applied,** *Getmapping plc v Ordnance Survey* [2003] ICR 1

Brook v Haringey London Borough Council [1992] IRLR 478, EAT. **Disapproved,** *Allonby v Accrington and Rossendale College* [2001] ICR 1189, CA

Brown v Secretary of State for Scotland (Case 197/86 [1988] ECR 3205, 3242, para 18, ECJ. **Dicta considered,** *Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la Neuve* (C-184/99) [2002] ICR 566, ECJ

Brunnhofer v Bank der Österreichischen Postparkasse AG (Case C-381/99) [2001] IRLR 571; [2001] ECR I-4961, ECJ. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT

Buckland v Watts [1970] 1 QB 27; [1969] 3 WLR 92; [1969] 2 All ER 985, CA. **Applied,** *Kingston upon Hull City Council v Dunnachie (No 3)* [2004] ICR 227, EAT

Burns v Royal Mail Group plc (formerly Consignia plc) [2004] ICR 1103, EAT. **Approved,** *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA

Burton v De Vere Hotels Ltd [1997] ICR 1, EAT. **Disapproved,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

Burton v Field Sons & Co Ltd [1977] ICR 106, EAT. **Approved,** *Consignia plc (formerly The Post Office) v Sealy* [2002] ICR 1193, CA

Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] AC 426, 431, HL(E). **Dicta of Lord Macnaghten considered,** *Latchman v Reed Business Information Ltd* [2002] ICR 1453, EAT

Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, EAT. **Considered,** *Redrow Homes (Yorkshire) Ltd v Wright* [2004] ICR 1126, CA

Camden and Islington Community Services NHS Trust v Kennedy [1996] IRLR 381, EAT. **Distinguished,** *Peters v Sat Katar Co Ltd* [2003] ICR 1574, CA

Campbell v Frisbee [2002] EMLR 656. **Decision of Lightman J reversed** [2003] ICR 141, CA

Canada Life Ltd v Gray [2004] ICR 673, EAT. **Overruled,** *Inland Revenue Comrs v Ainsworth* [2005] ICR 1149, CA

Capital Cranfield Trustees Ltd v Pinsent Curtis [2005] Pens LR 251. **Decision of Lindsay J affirmed** [2005] ICR 1767, CA

Capital Foods Retail Ltd v Corrigan [1993] IRLR 430, EAT (Sc). **Distinguished,** *Peters v Sat Katar Co Ltd* [2003] ICR 1574, CA

Care First Partnership Ltd v Roffey [2001] ICR 87, CA. **Applied,** *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646, CA

Carmichael v National Power plc [1999] ICR 1226; [1999] 1 WLR 2042; [1999] 4 All ER 897, HL(E). **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA. **Considered,** *Franks v Reuters Ltd* [2003] ICR 1166, CA

Carr v Allen-Bradeley Electronics Ltd [1980] ICR 603, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Carson v Carson and Stoyek [1964] 1 WLR 511; [1964] 1 All ER 681. **Considered,** *Meteorological Office v Edgar* [2002] ICR 149, EAT

Carter v Ahsan [2004] ICR 938, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 1817, CA

Carver v Saudi Arabian Airlines [1999] ICR 991, CA. **Applied,** *Saggar v Ministry of Defence* [2004] ICR 1708, EAT. **Considered,** *Saggar v Ministry of Defence* [2005] ICR 1073, CA

Cast v Croydon College [1998] ICR 500, 515, CA. **Applied,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT. **Dicta of Auld LJ doubted,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Catherall v Michelin Tyres plc [2003] ICR 28, EAT. **Approved,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Cement Makers' Federation Agreement (No 2), In re [1974] ICR 445; [1974] 2 All ER 219, RP Ct (E & W). **Considered,** *In re Medicaments and Related Classes of Goods (No 3)* [2001] ICR 306, RP Ct

Centre public d'aide sociale de Courcelles v Lebon (Case 316/85) [1987] ECR 2811, 2839, para 26, ECJ. **Dicta considered,** *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] ICR 37, ECJ

Cerberus Software Ltd v Rowley [2000] ICR 35, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 376, CA

Chamberlin v Emokpae [2004] ICR 1476, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 931, CA

Chamberlin v Emokpae [2004] ICR 1476, para 38, EAT. **Dicta of Judge McMullen QC disapproved,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

Chanel Ltd v Woolworth & Co Ltd [1981] 1 WLR 485; [1981] 1 All ER 745, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Chapman v Stone [1994] IRLR 124, CA. **Applied,** *Ahuja v Inghams (Accountants)* [2002] ICR 1485, CA

Charlton v Charlton Thermosystems (Romsey) Ltd [1995] ICR 56, EAT. **Considered,** *Atos Origin IT Service UK Ltd v Haddock* [2005] ICR 277, EAT

Chatterjee v City and Hackney Community Services NHS Trust (1998) 49 BMLR 55. **Considered,** *Skidmore v Dartford and Gravesham NHS Trust* [2001] ICR 911, EAT. **Disapproved,** *Saeed v Royal Wolverhampton Hospitals NHS Trust* [2001] ICR 903, CA

Chaudhary v Royal College of Surgeons [2003] ICR 1510, CA. **Applied,** *Chaudhary v Specialist Training Authority Appeal Panel (No 2)* [2005] ICR 1086, CA

Chief Adjudication Officer v Foster [1993] AC 754; [1993] 2 WLR 292; [1993] 1 All ER 705, HL(E). **Applied,** *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, CA

Chief Constable of Bedfordshire Police v Liversidge [2002] IRLR 15, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1135, CA

Chief Constable of Bedfordshire Police v Liversidge [2002] IRLR 15, EAT; [2002] ICR 1135, CA. **Distinguished,** *Chief Constable of Cumbria v McGlennon* [2002] ICR 1156, EAT

Chief Constable of Bedfordshire Police v Liversidge [2002] ICR 1135, CA. **Considered,** *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530, CA. **Distinguished,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Chief Constable of Cumbria v McGlennon [2002] ICR 1156, CA. **Followed,** *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660, EAT. **Approved,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Chief Constable of the Royal Ulster Constabulary v Seargeant A [2000] NI 261, 272, CA(NI). **Dictum of Carswell LCJ not applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Chief Constable of the West Yorkshire Police v A [2001] ICR 128, EAT. **Considered,** *X v Comr of Police of the Metropolis* [2003] ICR 1031, EAT

Chief Constable of the West Yorkshire Police v A (No 2) [2002] ICR 552, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 161, CA

Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161; [2003] 1 All ER 255, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 806, HL(E)

Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161; [2003] 1 All ER 255, CA. **Considered,** *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, CA

Chief Constable of the West Yorkshire Police v Khan [2000] ICR 1169, CA. **Decision of the Court of Appeal reversed** [2001] ICR 1065, HL(E)

Chief Constable of the West Yorkshire Police v Khan [2000] ICR 1169, CA. **Applied,** *Brown v TNT Express Worldwide (UK) Ltd* [2001] ICR 182, CA

Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065; [2001] 1 WLR 1947; [2001] 4 All ER 834, HL(E). **Applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Chohan v Derby Law Centre [2004] IRLR 685, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT

Clark v BET plc [1997] IRLR 348, 349, EAT. **Dicta of Timothy Walker J approved,** *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, CA

Clark v Midland Packaging Ltd [2005] 2 All ER 266, EAT. **Not followed,** *Woodward v Abbey National plc (No 2)* [2005] ICR 1702, EAT

Clark v Nomura International plc [2000] IRLR 766, 775. **Dicta of Burton J approved,** *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, CA

Clark v Novacold Ltd [1999] ICR 951; [1999] 2 All ER 977, CA. **Applied,** *McAuley Catholic High School v C* [2004] ICR 1563. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT

Clark v Perks (No 2) [2000] STC 428. **Decision of Ferris J reversed** [2002] ICR 302, CA

Clunis v Camden and Islington Health Authority [1998] QB 978; [1998] 2 WLR 902; [1998] 3 All ER 180, CA. **Applied,** *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766, CA

Cobham v Frett [2001] 1 WLR 1775, PC. **Applied,** *Kwamin v Abbey National plc* [2004] ICR 841, EAT. **Distinguished,** *Connex South Eastern Ltd v Bangs* [2005] ICR 763, CA

Cole (Stanley) (Wainfleet) Ltd v Sheridan [2003] ICR 297, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1449, CA

Commission of the European Communities v Kingdom of Belgium (Case C-278/94) [1996] ECR I-4307, 4342–4343, paras 39 and 40, ECJ. **Dicta considered,** *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] ICR 37, ECJ

Comr of Police of the Metropolis v Harley [2001] ICR 927, EAT. **Not followed,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT. **Overruled,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Comr of Police of the Metropolis v Lowrey-Nesbitt [1999] ICR 401, EAT. **Considered,** *Spence v British Railways Board* [2001] ICR 232, EAT

Connex South Eastern Ltd v Bangs [2004] ICR 841, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 763, CA

Consignia plc (formerly The Post Office) v Sealy [2002] ICR 1193; [2002] 3 All ER 801, CA. **Explained,** *Initial Electronic Security Systems Ltd v Avdic* [2005] ICR 1598, EAT. **Distinguished,** *Tyne and Wear Autistic Society v Smith* [2005] ICR 663, EAT

Cooke v Secretary of State for Social Security [2002] 3 All ER 279, 285 CA. **Dicta of Hale LJ followed,** *Scott v Inland Revenue Comrs* [2004] ICR 1410, CA

Coote v Granada Hospitality Ltd (Case C-185/97) [1999] ICR 100; [1998] ECR I-5199, ECJ. **Applied,** *Chief Constable of West Yorkshire Police v A* [2001] ICR 128, EAT. **Distinguished,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA

Coote v Granada Hospitality Ltd (No 2) [1999] ICR 942, 950, CA. **Approved,** *Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd* [2003] ICR 867, HL(E). **Dicta of Morison J disapproved,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA

Coral Squash Clubs Ltd v Matthews [1979] ICR 607, EAT. **Applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Cornelius v University College of Swansea [1987] IRLR 141, CA. **Applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Coudert Bros v Normans Bay Ltd (formerly Illingworth Morris Ltd) [2004] EWCA Civ 215, The Times 24 March 2004, CA. **Followed,** *Prison Service v Beart (No 2)* [2005] ICR 1206, CA

Cox Toner (W E) (International) Ltd v Crook [1981] ICR 823, EAT. **Approved,** *Henry v London General Transport Services Ltd* [2002] ICR 910, CA

Cozens v Brutus [1973] AC 854, 861; [1972] 3 WLR 521; [1972] 2 All ER 1297, HL(E). **Dicta of Lord Reid applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Crank v Her Majesty's Stationery Office [1985] ICR 1, EAT. **Overruled,** *Fitzgerald v University of Kent at Canterbury* [2004] ICR 737, CA

Craven-Ellis v Canons Ltd [1936] 2 KB 403; [1936] 2 All ER 106, CA. **Considered,** *Eastbourne Borough Council v Foster* [2002] ICR 234, CA

Croft v Royal Mail Group plc (formerly Consignia plc) [2002] IRLR 851, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1425, CA

Dacas v Brook Street Bureau (UK) Ltd [2003] IRLR 190, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 1437, CA

de Haney v Brent MIND [2004] ICR 348, CA. **Considered,** *Rabahallah v British Telecommunications plc* [2005] ICR 440, EAT

Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53; [1974] 1 WLR 171; [1974] 1 All ER 520, CA. **Applied,** *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293, CA

Defrenne v Sabena (Case 149/77) [1978] ECR 1365, ECJ. **Applied,** *Jämställdhetsombudsmannen v Örebro Läns Landsting* (Case C-236/98) [2001] ICR 249, ECJ; *South Ayrshire Council v Morton* [2002] ICR 956, Ct of Sess

Del Monte Foods Ltd v Mundoon [1980] ICR 694, EAT. **Followed,** *Ramdoolar v Bycity Ltd* [2005] ICR 368, EAT

Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 750, CA

Department of Transport v Gallacher [1994] ICR 967, 974–975, CA. **Dicta of Neill LJ applied,** *Southwark London Borough Council v Whillier* [2001] ICR 1016, CA

Derby Specialist Fabrication Ltd v Burton [2001] ICR 833; [2001] 2 All ER 840, EAT. **Considered,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT; *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Devis (W) & Sons Ltd v Atkins [1977] ICR 662; [1977] AC 931; [1977] 3 WLR 214; [1977] 3 All ER 40, HL(E). **Applied,** *Melia v Magna Kansei Ltd* [2005] ICR 874, EAT

Dickie v Cathay Pacific Airways Ltd [2004] ICR 1733, EAT. **Decision of the Employment Appeal Tribunal reversed in part** [2005] ICR 1436, CA

Dorling v Sheffield City Council [2002] ELR 367. **Considered,** *R (Verner) v Derby City Council* [2004] ICR 535

Dormers Wells Infant School v Gill (unreported) 16 July 1999, EAT. **Overruled,** *Wall v British Compressed Air Society* [2004] ICR 408

Dorney v Chippenham College (unreported) 28 May 1997, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Driskel v Peninsula Business Services Ltd [2000] IRLR 151, EAT. **Considered,** *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, EAT

D'Souza v Lambeth London Borough Council [2001] EWCA Civ 794, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 867, HL(E)

D'Souza v Lambeth London Borough Council [2001] EWCA Civ 794, CA. **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT

Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366; [2002] 3 WLR 1913; [2003] 1 All ER 97, HL(E). **Applied,** *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] ICR 1335, CA; *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA

Dunk v George Waller & Son Ltd [1970] 2 QB 163; [1970] 2 WLR 1241; [1970] 2 All ER 630, CA. **Distinguished,** *Flett v Matheson* [2005] ICR 1134, EAT

Dunn v British Coal Corpn [1993] ICR 591, CA. **Considered,** *Bennett v Compass Group UK and Ireland Ltd* [2002] ICR 1177, CA

Dunnachie v Kingston upon Hull City Council [2003] ICR 1294, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 481, CA

Dunnachie v Kingston upon Hull City Council [2004] ICR 481; [2004] 2 All ER 501, CA. **Decision of the Court of Appeal reversed** [2004] ICR 1052, HL(E)

Ealing Hammersmith and Hounslow Family Health Services Authority v Shukla [1993] ICR 710, EAT. **Followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Eastwood v Magnox Electric plc (Note) [2003] ICR 520, CA. **Decision of the Court of Appeal reversed** [2004] ICR 1064, HL(E)

Eastwood v Magnox Electric plc (Note) [2003] ICR 520, CA. **Distinguished,** *McCabe v Cornwall County Council* [2003] ICR 501, CA

Eaton Ltd v Nuttall [1977] ICR 272; [1977] 1 WLR 549; [1977] 3 All ER 1131, EAT. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Edge v Pensions Ombudsman [2000] ICR 748; [2000] Ch 602; [2000] 3 WLR 79; [1999] 4 All ER 546, CA. **Considered,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Edwards v Bairstow [1956] AC 14, 36; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA. **Dicta of Lord Radcliffe applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Elliott v Pensions Ombudsman [1998] OPLR 21. **Not followed,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Enderby v Frenchay Health Authority (Case C-127/92) [1994] ICR 112; [1994] 1 All ER 495; [1993] ECR I-5535, ECJ. **Applied,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

English v Emery Reimbold & Strick Ltd (Practice Note) [2002] 1 WLR 2409, 2419, para 25; [2002] 3 All ER 385, CA. **Applied,** *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA. **Dicta applied,** *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103, EAT

Essa v Laing Ltd [2003] ICR 1110, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2004] ICR 746, CA

Expro Services Ltd v Smith [1991] ICR 577, EAT. **Considered,** *Alderson v Secretary of State for Trade and Industry* [2004] ICR 512, CA

Facey v Midas Retail Security Ltd [2001] ICR 287, EAT. **Approved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Fadipe v Reed Nursing Personnel (Note) [2005] ICR 1760, CA. **Applied,** *Woodward v Abbey National plc (No 1)* [2005] ICR 1750, EAT

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412; [2002] 1 WLR 1052, CA. **Decision of the Court of Appeal reversed** [2002] ICR 798, HL(E)

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412; [2002] 1 WLR 1052, CA. **Applied,** *McCook v Lobo* [2003] ICR 89, CA

Farah v Comr of Police of the Metropolis [1998] QB 65; [1997] 2 WLR 824; [1997] 1 All ER 289, CA. **Distinguished,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche (Case C-244/94) [1994] ECR I-4013, ECJ. **Considered,** *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Cases C-115–117/97) [2001] ICR 774, ECJ

Ferguson v Welsh [1987] 1 WLR 1553; [1987] 3 All ER 777, HL(E). **Applied,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA. **Considered,** *Makepeace v Evans Brothers (Reading)* [2001] ICR 241, CA

Fielding (Harold) Ltd v Mansi [1974] ICR 347; [1974] 1 All ER 1035, NIRC. **Not followed,** *Bower v Stevens* [2004] ICR 1582, CA

Fogarty v United Kingdom (2001) 34 EHRR 302. **Considered,** *Matthews v Ministry of Defence* [2002] ICR 1003, CA. **Distinguished,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] ICR 1283; [2001] 1 All ER 550, CA. **Followed,** *X v Y* [2004] ICR 1634, CA. **Applied,** *J Sainsbury plc v Hitt* [2003] ICR 111, CA; *X v Y* [2003] ICR 1138, EAT

Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar (Case 105/84) [1985] ECR 2639, ECJ. **Applied,** *Collino v Telecom Italia SpA* (Case C-343/98) [2002] ICR 38, ECJ

Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S (Case 324/86) [1988] ECR 739, ECJ. **Considered,** *Martin v South Bank University* (Case C-04/01) [2004] ICR 1234, ECJ

Francovich v Italian Republic (Cases C-6/90 and C-9/90) [1995] ICR 722, 767–768, para 11; [1991] ECR I-5357, ECJ. **Dicta applied,** *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ

Fytche v Wincanton Logistics plc [2003] ICR 1582, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 975, HL(E)

Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services) [2004] ICR 1489, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 673, CA

General Council of British Shipping v Deria [1985] ICR 198, EAT. **Followed,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 297, EAT. **Considered,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, CA

Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443, CA. **Considered,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA

Gibson v East Riding of Yorkshire Council [2000] ICR 890, CA. **Applied,** *Voteforce Associates Ltd v Quinn* [2002] ICR 1, EAT. **Considered,** *Bamsey v Albon Engineering and Manufacturing plc* [2004] ICR 1083, CA

Gillespie v Northern Health and Social Services Board (Case C-342/93) [1996] ICR 498; [1996] ECR I-475, ECJ. **Applied,** *Alabaster v Woolwich plc* (Case C-147/02) [2005] ICR 695, ECJ; *Hoyland v Asda Stores Ltd* [2005] ICR 1235, EAT(Sc)

Glasgow City Council v Marshall [2000] ICR 196, 203; [2000] 1 WLR 333; [2000] 1 All ER 641, HL(Sc). **Dicta of Lord Nicholls of Birkenhead applied,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT. **Dicta of Lord Nicholls of Birkenhead considered,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

Gloucester Working Men's Club & Institute v James [1986] ICR 603, EAT. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Gogay v Hertfordshire County Council [2000] IRLR 703, CA. **Considered,** *McCabe v Cornwall County Council* [2003] ICR 501, CA

Goodwin v Patent Office [1999] ICR 302, EAT. **Considered,** *Rugamer v Sony Music Entertainment UK Ltd* [2002] ICR 381, EAT

Goodwin v United Kingdom (2002) 35 EHRR 447. **Applied,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2003] ICR 161, CA. **Considered,** *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, CA

Grady v Prison Service [2003] ICR 753, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 753, CA

Grady v Prison Service [2003] ICR 753; [2003] 3 All ER 745, CA. **Applied,** *Khan v Trident Safeguards Ltd* [2004] ICR 1591, CA

Greater Manchester Fire & Civil Defence Authority v Bradley (unreported) 27 April 2001, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

Green v Governing Body of Victoria Road Primary School [2003] ICR 713, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 684, CA

Green v Governing Body of Victoria Road Primary School [2004] ICR 684; [2004] 2 All ER 763, CA. **Applied,** *Murphy v Slough Borough Council* [2004] ICR 1163, EAT. **Considered,** *Murphy v Slough Borough Council* [2005] ICR 721, CA

Greenwood v British Airways plc [1999] ICR 969, 977 EAT. **Dicta of Judge Peter Clark considered,** *Latchman v Reed Business Information Ltd* [2002] ICR 1453, EAT

Gridquest Ltd (trading as Select Employment) v Blackburn [2002] ICR 682, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 1206, CA

Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve (Case C-184/99) [2002] ICR 566; [2001] ECR I-6193, ECJ. **Considered,** *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] ICR 37, ECJ

Guiot, Criminal proceedings against (Case C-272/94) [1996] ECR I-1905, ECJ. **Applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Hackney London Borough Council v Usher [1997] ICR 705, EAT. **Considered,** *Care First Partnership Ltd v Roffey* [2001] ICR 87, CA; *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Halfpenny v IGE Systems Ltd [1999] ICR 834, CA. **Decision of the Court of Appeal reversed** [2001] ICR 73, HL(E)

Hall v Lorimer [1994] ICR 218, 226; [1994] 1 WLR 209; [1994] 1 All ER 250, CA. **Dictum of Nolan LJ applied,** *Synaptek Ltd v Young* [2003] ICR 1149

Hall v Woolston Hall Leisure Ltd [1998] ICR 651, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 99, CA

Hall v Woolston Hall Leisure Ltd [2001] ICR 99; [2001] 1 WLR 225; [2000] 4 All ER 787, CA. **Applied,** *Governing Body of Addey and Stanhope School v Vakante* [2003] ICR 290, EAT; *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2005] ICR 231, CA; *Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant)* [2005] ICR 265, CA. **Distinguished,** *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 279, EAT

Hallam v Avery [2000] ICR 583; [2000] 1 WLR 966, CA. **Decision of the Court of Appeal affirmed on different grounds** [2001] ICR 408, HL(E)

Hammersmith and Fulham London Borough Council v Ladejobi [1999] ICR 673, EAT. **Followed,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Approved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA. **Not followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, EAT.

Handels- og KontorfunktionÌrenes Forbund i Danmark v Dansk Arbejdsiverforening, acting on behalf of Danfoss (Case 109/88) [1991] ICR 74; [1989] ECR 3199, ECJ. **Applied,** *Health and Safety Executive v Cadman* [2004] ICR 378, EAT. **Considered,** *Health and Safety Executive v Cadman* [2005] ICR 1546, CA

Hanly v Norinchukin International plc [2003] ICR 1416, EAT. **Considered,** *Spicer v Government of Spain* [2005] ICR 213, CA

Hardy v Polk (Leeds) Ltd (Note) [2005] ICR 557, EAT. **Not followed,** *Voith Turbo Ltd v Stowe* [2005] ICR 543, EAT

Harper v Virgin Net Ltd (Note) [2005] ICR 921, CA. **Applied,** *Wise Group v Mitchell* [2005] ICR 896, EAT

Harris v Lord Shuttleworth [1994] ICR 991, CA. **Considered,** *Venables v Hornby* [2002] ICR 81

Harrison v National Coal Board [1951] AC 639, 671; [1951] 1 All ER 1102, HL(E). **Dicta of Lord MacDermott applied,** *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA

Harrold v Wiltshire Healthcare NHS Trust (unreported) 16 March 1999, EAT. **Not followed,** *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, EAT

Harwood-Smart v Caws [2000] PLR 101. **Followed,** *BEC Pension Trustee Ltd v Sheppeck* [2002] ICR 1343

Hatton v Sutherland [2002] ICR 613, paras 23, 29, 43; [2002] 2 All ER 1, CA. **Applied,** *Banks v Ablex Ltd* [2005] ICR 819, CA. **Considered,** *Pratley v Surrey County Council* [2004] ICR 159, CA. **Dicta considered,** *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] ICR 782, CA

Healey v Bridgend County Borough Council (Note) [2004] ICR 561, CA. **Followed,** *R (Verner) v Derby City Council)* [2004] ICR 535

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575, HL(E). **Applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Heinz (H J) & Co Ltd v Kenrick [2000] ICR 491, 498, para 24, EAT. **Considered,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT. **Dicta of Lindsay J considered,** *Ramdoolar v Bycity Ltd* [2005] ICR 368, EAT

Henderson v Henderson (1843) 3 Hare 100. **Considered,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 181; [1994] 3 WLR 761; [1994] 3 All ER 506, HL(E). **Dicta of Lord Goff of Chieveley applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Henderson v Wakefield Shirt Co Ltd [1997] PIQR P413, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Henke v Gemeinde Schierke (Case C-298/94) [1997] ICR 746; [1996] ECR I-4989, ECJ. **Considered,** *Mayeur v Association Promotion de l'Information Messine (APIM)* (Case C-175/99) [2002] ICR 1316, ECJ

Hennessy v Craigmyle & Co Ltd [1986] ICR 461, 470, CA. **Dicta of Sir John Donaldson MR applied,** *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, CA

Henry v London General Transport Services Ltd [2001] IRLR 132, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 910, CA

Hetton Victory Club Ltd v Swainston [1983] ICR 341; [1983] 1 All ER 1179, CA. **Applied,** *Tyne and Wear Autistic Society v Smith* [2005] ICR 663, EAT

High Table Ltd v Horst [1998] ICR 409, CA. **Applied,** *Pitman v Foreign and Commonwealth Office* [2003] ICR 699, EAT

Hillsdown Holdings plc v Inland Revenue Comrs [1999] STC 561. **Considered,** *Venables v Hornby* [2002] ICR 81. **Distinguished,** *Venables v Hornby* [2003] ICR 186, CA

Hinckley and Bosworth London Borough Council v Shaw [2000] LGR 9. **Distinguished,** *Barking and Dagenham London Borough Council v Watts* [2003] ICR 1059

Hipwood v Gloucester Health Authority [1995] ICR 999, 1004–1005, CA. **Dicta of McCowan LJ applied,** *Bennett v Compass Group UK and Ireland Ltd* [2002] ICR 1177, CA

Hoechst AG v Commission of the European Communities (Cases 46/87 and 227/88) [1989] ECR 2859, ECJ. **Considered,** *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* (Case C-94/00) [2004] ICR 66, ECJ

Horcal v Gatland [1984] BCLC 549, CA. **Distinguished,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Horkulak v Cantor Fitzgerald International [2004] ICR 697. **Decision of Newman J varied** [2005] ICR 402, CA

Horrocks v Lowe [1975] AC 135, 150; [1974] 2 WLR 282; [1974] 1 All ER 662, HL(E). **Dicta of Lord Diplock applied,** *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97, CA

Humphreys v University of Oxford [2000] ICR 405; [2000] 1 All ER 996, CA. **Considered,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Hunter v Butler [1996] RTR 396, CA. **Applied,** *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766, CA

Hurditch v Sheffield Health Authority [1989] QB 562; [1989] 2 WLR 827; [1989] 2 All ER 869, CA. **Followed,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Immigration Advisory Service v Oommen [1997] ICR 683, EAT. **Followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, EAT. **Disapproved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Ingram v Foxon [1984] ICR 685, EAT. **Followed,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Inland Revenue Comrs v Bebb Travel [2003] ICR 201, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1271, CA

Inland Revenue Comrs v Scottish & Newcastle Breweries Ltd [1982] 1 WLR 322, 327; [1982] 2 All ER 230, HL(Sc). **Dicta of Lord Lowry applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912–913; [1998] 1 All ER 98, HL(E). **Dicta of Lord Hoffmann applied,** *Bank of Credit and Commerce International SA v Ali* [2001] ICR 337, HL(E)

Item Software (UK) Ltd v Fassihi [2003] 2 BCLC 1. **Decision of Nicholas Strauss QC sitting as a deputy judge of the High Court allowed in part** [2005] ICR 450, CA

Jackson v Chief Adjudication Officer (Cases C-63 and 64/91) [1993] QB 367; [1993] 2 WLR 658; [1993] 3 All ER 265; [1992] ECR I-4737, ECJ. **Considered,** *Hockenjos v Secretary of State for Social Security* [2001] ICR 966, CA

Jacobi v Griffiths (1999) 174 DLR (4th) 71. **Applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Jameson v Lovis [2001] EWCA Civ 1264, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Jayes v IMI (Kynoch) Ltd [1985] ICR 155, CA. **Not followed,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Jeetle v Elster [1985] ICR 389, 400, EAT. **Dicta of Beldam J approved,** *Bower v Stevens* [2004] ICR 1582, CA

Jenkins v Kingsgate (Clothing Productions) Ltd (Case 96/80) [1981] ICR 592; [1981] 1 WLR 972; [1981] ECR 911, ECJ. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT

Johnson v Gore-Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E). **Applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA; *R (Foster) v Eastbourne Borough Council* [2004] ICR 1149, CA

Johnson v Ryan [2000] ICR 236, EAT. **Considered,** *Lincolnshire County Council v Hopper* [2002] ICR 1301, EAT

Johnson v Unisys Ltd [1999] ICR 809, CA. **Decision of the Court of Appeal affirmed** [2001] ICR 480, HL(E)

Johnson v Unisys Ltd [2001] ICR 480, 500, para 55; [2003] 1 AC 518; [2001] 2 WLR 1076; [2001] 2 All ER 801, HL(E). **Applied,** *Horkulak v Cantor Fitzgerald International* [2004] ICR 697. **Considered,** *McCabe v Cornwall County Council* [2003] ICR 501, CA. **Dicta of Lord Hoffmann considered,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA. **Explained,** *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294, EAT. **Dicta of Lord Hoffmann not applied,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL(E). **Distinguished,** *Eastwood v Magnox Electric plc* [2004] ICR 1064, HL(E)

Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] ICR 83; [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1980] ECR 1651, ECJ. **Applied,** *Chief Constable of the West Yorkshire Police v A* [2001] ICR 128, EAT

Jones v 3M Healthcare Ltd [2002] ICR 341, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1124, CA

Jones v 3M Healthcare Ltd [2002] ICR 1124, CA. **Decision of the Court of Appeal reversed** [2003] ICR 867, HL(E)

Jones v Governing Body of Burdett Coutts School [1999] ICR 38, CA. **Considered,** *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530, CA

Jones v Mid-Glamorgan County Council [1997] ICR 815, 826, CA. **Dicta of Waite LJ applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Joseph v Heath Ltd (unreported) 11 February 1998, EAT. **Considered,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Jowitt v Pioneer Technology (UK) Ltd [2002] IRLR 790, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 1120, CA

Kalanke v Freie Hansestadt Bremen (Case C-450/93) [1996] ICR 314; [1996] All ER (EC) 66; [1995] ECR I-3051, ECJ. **Considered,** *Marschall v Land Nordrhein-Westfalen* (Case C-409/95) [2001] ICR 45, ECJ

Kaur v MG Rover Group Ltd [2004] IRLR 279. **Decision of Judge Alton sitting as a judge of the High Court reversed in part** [2005] ICR 625, CA

Kelly v First Engineering Ltd 1999 SCLR 1025, Ct of Sess. **Considered,** *Hammond v Comr of Police of the Metropolis* [2004] ICR 1467, CA

Kelly v Liverpool Maritime Terminals Ltd [1988] IRLR 310, CA. **Explained,** *Halfpenny v IGE Systems Ltd* [2001] ICR 73, HL(E)

Kelly v Northern Ireland Housing Executive [1998] ICR 828; [1999] 1 AC 428; [1998] 3 WLR 735, HL(NI). **Distinguished,** *Patterson v Legal Services Commission* [2004] ICR 312, EAT and CA

Kenny v Hampshire Constabulary [1999] ICR 27, EAT. **Considered,** *Edwards v Mid-Suffolk District Council* [2001] ICR 616, CA

Kerry Foods Ltd v Creber [2000] ICR 556, EAT. **Followed,** *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829, EAT. **Distinguished,** *Transport & General Workers' Union v McKinnon, J R Haulage Ltd* [2001] ICR 1281, EAT(Sc)

Khan v General Medical Council [1996] ICR 1032, 1043–1044, CA. **Applied,** *Chaudhary v Specialist Training Authority Appeal Panel (No 2)* [2005] ICR 1086, CA. **Dicta of Hoffmann LJ applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Kigass Aero Components Ltd v Brown [2002] ICR 697, 700, 702, paras 8, 12, EAT. **Dicta of Lindsay J explained,** *Canada Life Ltd v Gray* [2004] ICR 673, EAT. **Overruled,** *Inland Revenue Comrs v Ainsworth* [2005] ICR 1149, CA

King v Eaton Ltd (No 2) [1998] IRLR 686, Ct of Sess. **Followed,** *Lambe v 186K Ltd* [2005] ICR 307, CA

King v Great Britain-China Centre [1992] ICR 516, 529, CA. **Applied,** *Anya v University of Oxford* [2001] ICR 847, CA. **Dicta of Neill LJ applied,** *Rowden v Dutton Gregory* [2002] ICR 971, EAT. **Considered,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

Kirby v Manpower Services Commission [1980] ICR 420; [1980] 1 WLR 725; [1980] 3 All ER 334, EAT. **Not applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Kirton v Tetrosyl Ltd [2003] ICR 37, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 1237, CA

Knulty v Eloc Electro-Optiek and Communicatie BV [1979] ICR 827. **Disapproved,** *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249, EAT

Koonjul v Thameslink Healthcare Services [2000] PIQR P123, CA. **Considered,** *O'Neill v DSG Retail Ltd* [2003] ICR 222, CA

Kossinski v Chrysler United Kingdom Ltd (1973) 15 KIR 225, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Kramer v South Bedfordshire Community Health Care Trust [1995] ICR 1066. **Considered,** *Skidmore v Dartford & Gravesham NHS Trust* [2001] ICR 911, EAT. **Disapproved,** *Saeed v Royal Wolverhampton Hospitals NHS Trust* [2001] ICR 903, CA; [2003] ICR 721, CA

Krasner v Dennison [2001] Ch 76; [2000] 3 WLR 720; [2000] 3 All ER 322, CA. **Applied,** *In re Malcolm* [2005] ICR 611, CA

Kudrath v Ministry of Defence (unreported) 26 April 1999, EAT. **Approved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Kuttapan v Croydon London Borough Council [1999] IRLR 349, EAT. **Followed,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT. **Considered,** *Sodexho Ltd v Gibbons* [2005] ICR 1647, EAT

Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, 1091,; [2002] 2 WLR 1353; [2002] 3 All ER 209, HL(E). **Dicta of Lord Nicholls of Birkenhead applied,** *Essa v Laing Ltd* [2004] ICR 746, CA

Kwamin v Abbey National plc [2004] ICR 841, EAT. **Followed,** *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660, EAT. **Considered,** *Connex South Eastern Ltd v Bangs* [2005] ICR 763, CA

Kwik Save Stores Ltd v Greaves [1998] ICR 848, CA. **Overruled,** *Halfpenny v IGE Systems Ltd* [2001] ICR 73, HL(E)

Kwik Save Stores Ltd v Swain [1997] ICR 49, EAT. **Considered,** *Pendragon plc (trading as C D Bramall Bradford) v Copus* [2005] ICR 1671, EAT

Lambert v Croydon College [1999] ICR 409, EAT. **Overruled,** *Fitzgerald v University of Kent at Canterbury* [2004] ICR 737, CA

Lavarack v Woods of Colchester Ltd [1967] 1 QB 278; [1966] 3 WLR 706; [1966] 3 All ER 683, CA. **Distinguished,** *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, CA

Lawal v Northern Spirit Ltd [2002] ICR 486, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1507, CA

Lawal v Northern Spirit Ltd [2002] ICR 1507, CA. **Decision of the Court of Appeal reversed** [2003] ICR 856, HL(E)

Lawrence v Regent Office Care Ltd [1999] ICR 654, EAT. **Considered,** *South Ayrshire Council v Morton* [2002] ICR 956, Ct of Sess

Lawrence v Regent Office Care Ltd (Case C-320/00) [2003] ICR 1092; [2002] ECR I-7325, ECJ. **Applied,** *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328, ECJ; *Department for Environment Food and Rural Affairs v Robertson* [2005] ICR 750, CA. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Lawson v Serco Ltd [2004] ICR 204; [2004] 2 All ER 200, CA. **Applied,** *Shekar v Satyam Computer Services Ltd* [2005] ICR 737, Employment Tribunal; *Crofts v Cathay Pacific Airways Ltd* [2005] ICR 1436, CA

Leighton v Michael [1995] ICR 1091, EAT. **Followed,** *Governing Body of Addey and Stanhope School v Vakante* [2003] ICR 290, EAT. **Approved,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA. **Distinguished,** *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 279, EAT

Lennon v Birmingham City Council [2001] IRLR 826, CA. **Distinguished,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Les Ambassadeurs Club v Bainda [1982] IRLR 5, EAT. **Disapproved,** *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] ICR 1000, CA

Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521; [1998] ECR I-7835, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E)

Lewis v Motorworld Garages Ltd [1986] ICR 157, CA. **Followed,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA. **Considered,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Lindsay v Ironsides Ray & Vials [1994] ICR 384, EAT. **Considered,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, CA

Liskojarvi v Oy Liikenne Ab (Case C-172/99) [2002] ICR 155; [2001] ECR I-745, ECJ. **Distinguished,** *NUMAST v P & O Scottish Ferries Ltd* [2005] ICR 1270, EAT(Sc)

List Design Group Ltd v Douglas [2002] ICR 686, EAT. **Followed,** *Canada Life Ltd v Gray* [2004] ICR 673, EAT

Lister v Hesley Hall Ltd [2001] ICR 665; [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] 2 All ER 769, HL(E). **Applied,** *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] ICR 1335, CA; *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA. **Applied,** *Facey v Midas Retail Security Ltd* [2001] ICR 287, EAT

L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486; [1994] 2 WLR 39; [1994] 1 All ER 20, HL(E). **Applied,** *Meteorological Office v Edgar* [2002] ICR 149, EAT

London Underground Ltd v National Union of Rail, Maritime & Transport Workers [2001] ICR 647, CA. **Distinguished,** *Westminster City Council v UNISON* [2001] ICR 1046, CA

London Underground Ltd v National Union of Railwaymen, Maritime & Transport Staff [1996] ICR 170, 178, CA. **Dicta of Millett LJ applied,** *P (A Minor) v National Association of School Masters/Union of Women Teachers* [2001] ICR 1241, CA. **Considered,** *P (A Minor) v National Association of School Masters/Union of Women Teachers* [2003] ICR 386, HL(E)

Lord Chancellor v Coker [2001] ICR 507, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 321, CA

Lord Chancellor v Coker [2001] ICR 507, EAT. **Not applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Lunt v Merseyside TEC Ltd [1999] ICR 17, EAT. **Considered,** *University of East London v Hinton* [2005] ICR 1260, CA

MPB Structures Ltd v Munro [2002] IRLR 601, EAT(Sc). **Decision of the Employment Appeal Tribunal (Scotland) affirmed** [2004] ICR 430, Ct of Sess

MPB Structures Ltd v Munro [2004] ICR 430, Ct of Sess. **Not followed,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 436, EAT. **Not approved,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 1502, CA

McCabe v Cornwall County Council [2003] ICR 501, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 1064, HL(E)

MacCulloch & Wallis Ltd v Moore (unreported) 11 February 2003, EAT. **Considered,** *Forster v Cartwright Black* [2004] ICR 1728, EAT

Macdonald v Ministry of Defence [2001] ICR 1, EAT (Sc). **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 174, Ct of Sess

Macdonald v Ministry of Defence [2002] ICR 174, Ct of Sess. **Decision of the Court of Session affirmed** [2003] ICR 937, HL(Sc)

Macdonald v Ministry of Defence [2002] ICR 174, Ct of Sess. **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA

McGhee v National Coal Board [1973] 1 WLR 1; [1972] 3 All ER 1008, HL(Sc). **Distinguished,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Mackie v John Holt Vintners Ltd (Note) [1982] ICR 146, EAT. **Distinguished,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

McMeechan v Secretary of State for Employment [1997] ICR 549, CA. **Considered,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 381, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1498, CA

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 1498, CA. **Considered,** *Dunham v Ashford Windows Ltd* [2005] ICR 1584, EAT

McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA. **Applied,** *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT

Magorrian v Eastern Health and Social Services Board (Case C-246/98) [1998] ICR 979; [1997] ECR I-7153, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E). **Distinguished,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT; [2002] ICR 602, CA

Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, 609, 621; [1998] AC 20; [1997] 3 WLR 95; [1997] 3 All ER 1, HL(E). **Applied,** *Bank of Credit and SA v Ali (No 2) Commerce International* [2002] ICR 1258, CA; *Horkulak v Cantor Fitzgerald International* [2004] ICR 697. **Dicta applied,** *Transco plc v O'Brien* [2002] ICR 721, CA. **Distinguished,** *Johnson v Unisys Ltd* [2001] ICR 480, HL(E)

Makepiece v Evans Bros (Reading) [2001] ICR 241, 244, para 7, CA. **Observation of Mantell LJ considered,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Malcolm, In re [2004] 1 WLR 1803. **Decision of Lloyd J affirmed** [2005] ICR 611, CA

Marleasing SA v La Comercial Internacional de Alimentación (Case C-106/96) [1990] ECR I-4135, ECJ. **Applied,** *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ

Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (Case 152/84) [1986] ICR 335, 355, para 48; [1986] QB 401; [1986] 2 WLR 780; [1986] 2 All ER 584; [1986] ECR 723, ECJ. **Dicta applied,** *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ

Marshalls Clay Products Ltd v Caulfield [2004] ICR 436, para 37(ii), EAT. **Guidelines amended,** *Smith v A J Morrisroes & Sons Ltd* [2005] ICR 596, EAT

Martinez Sala v Freistaat Bayern (Case C-85/96) [1998] ECR I-2691, 2726, para 63, ECJ. **Dicta applied,** *Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve* (Case C-184/99) [2002] ICR 566, ECJ

Matthews v Kent and Medway Towns Fire Authority [2004] ICR 257, EAT. **Decision of the Employment Appeal Tribunal affirmed in part** [2005] ICR 84, CA

Matthews v Ministry of Defence [2002] EWHC 13 (QB). **Decision of Keith J reversed** [2002] ICR 1003, CA

Matthews v Ministry of Defence [2002] ICR 1003; [2002] 1 WLR 2621; [2002] 3 All ER 513, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 247, HL(E)

Maurice v Betterware UK Ltd [2001] ICR 14, EAT. **Considered,** *Sodexho Ltd v Gibbons* [2005] ICR 1647, EAT

Meek v City of Birmingham District Council [1987] IRLR 250, CA. **Followed,** *Lambe v 186K Ltd* [2005] ICR 307, CA

Merckx v Ford Motors Co (Belgium) SA (Cases C-171 and 172/94) [1997] ICR 352; [1996] ECR I-1253, ECJ. **Considered,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Mercury Communications Ltd v Scott-Garner [1984] ICR 74, CA. **Considered,** *Westminster City Council v UNISON* [2001] ICR 1046, CA

Metropolitan Police Service v Shoebridge [2004] ICR 1690, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT

Midland Mainline v Wade (unreported) 4 November 2002, EAT. **Approved,** *Parry v National Westminster Bank plc* [2005] ICR 396, CA

Migwain Ltd v Transport and General Workers' Union [1979] ICR 597, 601, EAT. **Dicta of Slynn J followed,** *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249, EAT

Miles v Wakefield Metropolitan District Council [1985] ICR 363; [1985] 1 WLR 822; [1985] 1 All ER 905, CA. **Applied,** *Lincolnshire County Council v Hopper* [2002] ICR 1301, EAT

Miles v Wakefield Metropolitan District Council [1987] ICR 368; [1987] AC 539; [1987] 2 WLR 795; [1987] 1 All ER 1089, HL(E). **Distinguished,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Ministry of Defence v Jeremiah [1980] ICR 13, 31; [1980] QB 87; [1979] 3 WLR 857; [1979] 3 All ER 833, CA. **Dictum of Brightman LJ applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Mirror Group Newspapers Ltd v Gunning [1986] ICR 145; [1986] 1 WLR 546; [1986] 1 All ER 385, CA. **Applied,** *Patterson v Legal Services Commission* [2004] ICR 312, EAT and CA

Mock v Inland Revenue Comrs [1999] IRLR 785, EAT. **Followed,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Not followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, CA

Morgan v Electrolux Ltd [1991] ICR 369, CA. **Applied,** *Bennett v Southwark London Borough Council* [2002] ICR 881, CA

Morgan v Staffordshire University [2002] ICR 475, 483, para 20, EAT. **Dicta of Lindsay J approved,** *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498, CA. **Considered,** *Dunham v Ashford Windows Ltd* [2005] ICR 1584, EAT

Moriarty v Regent's Garage and Engineering Co Ltd [1921] 1 KB 423, DC. **Considered,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Moroak (trading as Blake Envelopes) v Cromie [2005] ICR 1226, EAT. **Considered,** *Pendragon plc (trading as C D Bramall Bradford) v Copus* [2005] ICR 1671, EAT

Morris v Secretary of State for Employment [1985] ICR 522, EAT. **Followed,** *Titchener v Secretary of State for Trade and Industry* [2002] ICR 225, EAT

Morris v Walsh Western UK Ltd [1997] IRLR 562, EAT. **Considered,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Mulox IBC Ltd v Geels (Case C-125/92) [1993] ICR I-4075, ECJ. **Considered,** *Weber v Universal Ogden Services Ltd* (Case C-37/00) [2002] ICR 979, ECJ

Murphy v A Birrell & Sons Ltd [1978] IRLR 458, EAT (Sc). **Not followed,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Murphy v Epsom College [1985] ICR 80, CA. **Considered,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Murphy v Slough Borough Council [2004] ICR 1163, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 721, CA

Murray v Foyle Meats Ltd [1999] ICR 827; [2000] 1 AC 51; [1999] 3 WLR 356; [1999] 3 All ER 769, HL(NI). **Applied,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Nagarajan v London Regional Transport [1998] IRLR 73, CA. **Not applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Nagarajan v London Regional Transport [1999] ICR 877, 887; [2000] 1 AC 501; [1999] 3 WLR 425; [1999] 4 All ER 65, HL(E). **Applied,** *Chamberlin v Emokpae* [2004] ICR 1476, EAT. **Dicta of Lord Nicholls of Birkenhead applied,** *Hussain v King's College Hospital NHS Trust* [2002] ICR 1433, CA

National Coal Board v National Union of Mineworkers [1986] ICR 736, 773. **Dicta of Scott J approved,** *Kaur v MG Rover Group Ltd* [2005] ICR 625, CA

National Grid Co plc v Mayes [2000] ICR 174, CA. **Decision of the Court of Appeal reversed** [2001] ICR 544, HL(E)

Nelson v Carillion Services Ltd [2003] ICR 1256, para 26, CA. **Considered,** *Home Office v Bailey* [2005] ICR 1057, CA. **Dicta of Simon Brown LJ not followed,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

Net Book Agreement 1957 (No 4), In re [1998] ICR 753, RP Ct. **Considered,** *In re Medicaments and Related Classes of Goods (No 3)* [2001] ICR 306, RP Ct

Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, CA. **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA

Newham London Borough Council v Skingle [2002] ICR 1118. **Decision of Jacob J reversed** [2003] ICR 1008, CA

Newland v Simons & Willer (Hairdressers) Ltd [1981] ICR 521, EAT. **Doubted,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA

Nikitas v Solihull Metropolitan Borough Council [1986] ICR 291, EAT. **Followed,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

Nimz v Freie und Hansestadt Hamburg (Case C-184/89) [1991] ECR I-297; [1991] IRLR 222, ECJ. **Considered,** *Health and Safety Executive v Cadman* [2004] ICR 378, EAT

Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Bros [2004] EWCA Civ 215, The Times, 24 March 2004, CA. **Followed,** *Prison Service v Beart (No 2)* [2005] ICR 1206, CA

Norton Tool Co Ltd v Tewson [1972] ICR 501; [1973] 1 WLR 45; [1973] 1 All ER 183, NIRC. **Followed,** *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294, EAT; *Voith Turbo Ltd v Stowe* [2005] ICR 543, EAT. **Approved,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL(E). **Overruled,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA

O'Dea v ISC Chemicals Ltd [1966] ICR 222, CA. **Followed,** *Lambe v 186K Ltd* [2005] ICR 307, CA

O'Kelly v Trusthouse Forte plc [1983] ICR 728; [1984] QB 90; [1983] 3 WLR 605; [1983] 3 All ER 456, CA. **Applied,** *Bennett v Southwark London Borough Council* [2002] ICR 881, CA

O'Neill v Symm & Co Ltd [1998] ICR 481, EAT. **Considered,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT

Omar v Worldwide News Inc (trading as United Press International) [1998] IRLR 291, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Ord v Upton [2000] Ch 352; [2000] 2 WLR 755; [2000] 1 All ER 193, CA. **Distinguished,** *Khan v Trident Safeguards Ltd* [2004] ICR 1591, CA

Outram v Academy Plastics Ltd [2001] ICR 367, CA. **Distinguished,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Overseas Union Insurance Ltd v New Hampshire Insurance Co (Case C-351/89) [1992] QB 434, 458–459; [1992] 2 WLR 586; [1992] 2 All ER 138; [1991] ECR I-3317, ECJ. **Dicta applied,** *Turner v Grovit* (Case C-159/02) [2005] ICR 23, ECJ

Oxford v Department of Health and Social Security [1977] ICR 884, EAT. **Applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

P (A Minor) v National Association of School Masters/Union of Women Teachers [2001] ICR 1241, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 386, HL(E)

P v S (Case C-13/94) [1996] ICR 795; [1996] ECR I-2143, ECJ. **Considered,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] ICR 806, HL(E). **Distinguished,** *Ashton v Chief Constable of West Mercia Constabulary* [2001] ICR 67, EAT

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA

Page v Smith [1996] AC 155; [1995] 2 WLR 644; [1995] 2 All ER 736, HL(E). **Applied,** *Simmons v British Steel plc* [2004] ICR 585, HL(Sc)

Palmer v Southend-on-Sea Borough Council [1984] ICR 372; [1984] 1 WLR 1129; [1984] 1 All ER 945, CA. **Applied,** *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293, CA

Patterson v Legal Services Commission [2004] ICR 312, EAT. **Decision of the Employment Appeal Tribunal affirmed in part** [2004] ICR 312, CA

Patel v Nagesan [1995] ICR 988, CA. **Distinguished,** *Wall v British Compressed Air Society* [2004] ICR 408, CA

Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 198, CA

Pearce v Governing Body of Mayfield Secondary School [2002] ICR 198, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 937, HL(E)

Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT. **Followed,** *Macdonald v Ministry of Defence* [2002] ICR 174, Ct of Sess. **Not followed,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Pellegrin v France (1999) 31 EHRR 651. **Considered,** *Matthews v Ministry of Defence* [2002] ICR 1003, CA

Pepper v Hart [1993] ICR 291; [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E). **Considered,** *Addison (trading as Brayton News) v Ashby* [2003] ICR 667, EAT

Pet Plan Ltd v Protect-A-Pet Ltd [1988] FSR 34, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Pitts v Hunt [1991] 1 QB 24; [1990] 3 WLR 542; [1990] 3 All ER 344, CA. **Applied,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Polkey v A E Dayton Services Ltd [1988] ICR 142; [1988] AC 344; [1987] 3 WLR 1153; [1987] 3 All ER 974, HL(E). **Applied,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA. **Considered,** *Lambe v 186K Ltd* [2005] ICR 307, CA

Porcelli v Strathclyde Regional Council [1986] ICR 564, Ct of Sess. **Applied,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc). **Considered,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

Porter v Magill [2002] 2 AC 357; [2002] 3 WLR 437; [2002] 1 All ER 465, HL(E). **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 1507, CA; [2003] ICR 856, HL(E)

Post Office v Adekeye [1997] ICR 110, CA. **Applied,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA; *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT. **Considered,** *Jones v 3M Healthcare Ltd* [2002] ICR 341, EAT. **Overruled,** *Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd* [2003] ICR 867, HL(E)

Post Office v Howell [2000] ICR 913, EAT. **Considered,** *Morgan v Brith Gof Cyf* [2001] ICR 978, CA

Post Office v Jones [2000] ICR 388, EAT. **Decision of the Employment Appeal Tribunal affirmed on different grounds** [2001] ICR 805, CA

Post Office v Jones [2001] ICR 805, CA. **Applied,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT; *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT; *Murphy v Slough Borough Council* [2004] ICR 1163, EAT

Poucet v Assurances Générales de France (Cases C-159 and 160/91) [1993] ECR I-637, ECJ. **Considered,** *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Cases C-115–117/97) [2001] ICR 774, ECJ

Practice Direction (EAT: Procedure) [1996] ICR 422, 427 para 9, EAT. **Applied,** *Facey v Midas Retail Security Ltd* [2001] ICR 287, EAT; *Miriki v General Council of the Bar* [2002] ICR 505, CA

Practice Direction (Employment Appeal Tribunal: Procedure) 2002 [2003] ICR 122, EAT. **Applied,** *Khudados v Leggate* [2005] ICR 1013, EAT

Practice Direction (Employment Appeal Tribunal: Procedure) 2004 [2005] ICR 637, EAT. **Considered,** *Woodward v Abbey National plc (No 2)* [2005] ICR 1702, EAT

Pratley v Surrey County Council [2002] EWHC 1608 (QB). **Decision of Buckley J affirmed** [2004] ICR 159, CA

Presentaciones Musicales SA v Secunda [1994] Ch 271; [1994] 2 WLR 660; [1994] 2 All ER 737, CA. **Applied,** *Nottinghamshire Healthcare NHS Trust v Prison Officers' Association* [2003] ICR 1192, EAT

Preston v Wolverhampton Healthcare NHS Trust [1997] ICR 899, CA. **Decision of the Court of Appeal varied** [2001] ICR 217, HL(E)

Preston v Wolverhampton Healthcare NHS Trust [1998] ICR 227; [1998] 1 WLR 280; [1998] 1 All ER 528, HL(E). **Considered,** *Young v National Power plc* [2001] ICR 328, CA

Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT. **Decision of the Employment Appeal Tribunal reversed in part** [2005] ICR 222, CA

Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT. **Followed,** *Newcastle upon Tyne City Council v Allan* [2005] ICR 1170, EAT

Prison Service v Beart (No 2) [2005] IRLR 171, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 1206, CA

Prison Service v Johnson [1997] ICR 275, 283, EAT. **Followed,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT. **Dicta of Smith J approved,** *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, CA

Providence Capitol Trustees Ltd v Ayres [1996] 4 All ER 760, 763–764, 765. **Dicta of Chadwick J applied,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Puglia v C James & Sons [1996] ICR 301, EAT **Followed,** *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, EAT

Pye (J A) (Oxford) Ltd v Graham [2001] Ch 804; [2001] 2 WLR 1293, CA. **Followed,** *MacDonald v Ministry of Defence* [2002] ICR 174, Ct of Sess

Qua v John Ford Morrison [2003] ICR 482, EAT. **Considered,** *Forster v Cartwright Black* [2004] ICR 1728, EAT; *Truelove v Safeway Stores plc* [2005] ICR 589, EAT

Quinn v Schwarzkopf Ltd [2001] IRLR 67, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

Quirk v Burton Hospitals NHS Trust [2001] ICR 415, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 602, CA

Qureshi v Victoria University of Manchester (Note) [2001] ICR 847, EAT. **Approved,** *Anya v University of Oxford* [2001] ICR 847, CA

R v Broadcasting Corpn, Ex p Lavelle [1983] ICR 99; [1983] 1 WLR 23; [1983] 1 All ER 241. **Applied,** *R (Arthurworrey) v Haringey London Borough Council* [2002] ICR 279

R v British Coal Corpn, Ex p Vardy [1993] ICR 720, 753, DC. **Dicta of Glidewell LJ applied,** *MSF v Refuge Assurance plc* [2002] ICR 1365, EAT

R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 386; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E). **Dicta of Lord Hope of Craighead applied,** *R v Davies (David Janway)* [2003] ICR 586, CA

R v Gough [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E). **Considered,** *In re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, CA

R v Kellam, Ex p South Wales Police Authority [2000] ICR 632. **Considered,** *R (Stunt) v Mallett* [2001] ICR 989, CA

R v Lambert [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 1 All ER 577, HL(E). **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA

R v Newcastle-under-Lyme Justices, Ex p Massey [1994] 1 WLR 1684, 1692; [1995] 1 All ER 120, DC. **Dicta of Rose LJ applied,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

R v Secretary of State for Employment, Ex p Seymour-Smith (Case C-167/97) [1999] ICR 447; [1999] 2 AC 554; [1999] 3 WLR 460; [1999] ECR I-623, ECJ. **Applied,** *Secretary of State for Trade and Industry v Rutherford (No 2)* [2005] ICR 119, EAT and CA

R v Secretary of State for Employment, Ex p Seymour-Smith (No 2) [2000] ICR 244; [2000] 1 WLR 435; [2000] 1 All ER 857, HL(E). **Applied,** *Secretary of State for Trade and Industry v Rutherford (No 2)* [2005] ICR 119, EAT and CA

R v Secretary of State for Social Security, Ex p Moule (unreported) 12 September 1996, Collins J. **Considered,** *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, CA

R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354; [1999] 3 All ER 231, CA. **Distinguished,** *Rydqvist v Secretary of State for Work and Pensions* [2002] ICR 1383, CA

R (Britannic Asset Management Ltd) v Pensions Ombudsman [2002] EWHC 441 (Admin). **Decision of Lightman J affirmed** [2003] ICR 99, CA

R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99) [2001] ICR 1152; [2001] 1 WLR 2313; [2001] All ER (EC) 647; [2001] ECR I-4881, ECJ. **Considered,** *Voteforce Associates Ltd v Quinn* [2002] ICR 1, EAT. **Distinguished,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 1502, CA

R (Dorling) v Sheffield City Council [2003] ICR 424. **Considered,** *R (Verner) v Derby City Council* [2004] ICR 535

R (Foster) v Eastbourne Borough Council [2003] EWHC 948 (Admin). **Decision of Moses J affirmed** [2004] ICR 1149, CA

R (Junttan Oy) v Bristol Magistrates' Court [2002] ICR 1523; [2002] 4 All ER 965, DC. **Decision of the Divisional Court of the Queen's Bench Division reversed in part** [2003] ICR 1475, HL(E)

R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWHC 277 (Admin). **Decision of Elias J reversed** [2002] ICR 1212, CA

R (McGinley) v Schilling [2004] EWHC 1617 (Admin). **Decision of McCombe J affirmed** [2005] ICR 1282, CA

R (Touche) v Inner London North Coroner [2001] QB 1206; [2001] 3 WLR 148; [2001] 2 All ER 752, CA. **Considered,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

R (Ultraframe (UK) Ltd) v Central Arbitration Committee [2004] EWHC 112 (Admin). **Decision of Davis J reversed** [2005] ICR 1194, CA

RCO Support Services Ltd v UNISON [2000] ICR 1502, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 751, CA

Race Relations Board v Charter [1973] AC 868; [1973] 2 WLR 299; [1973] 1 All ER 512, HL(E). **Considered,** *Ali v McDonagh* [2002] ICR 1026, CA

Race Relations Board v Dockers' Labour Club and Institute Ltd [1976] AC 285; [1974] 3 WLR 533; [1974] 3 All ER 592, HL(E). **Considered,** *Ali v McDonagh* [2002] ICR 1026, CA

Ransom v Higgs [1974] 1 WLR 1594, 1618; [1974] 3 All ER 949, HL(E). **Dicta of Lord Simon of Glaisdale applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Rask v ISS Kantineservice A/S (Case C-2009/91) [1992] ECR I-5755, ECJ. **Applied,** *Collino v Telecom Italia SpA* (C-343/98) [2002] ICR 38, ECJ

Raspin v United News Shops Ltd [1999] IRLR 9, EAT. **Not followed,** *Wise Group v Mitchell* [2005] ICR 896, EAT

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515; [1968] 2 WLR 775; [1968] 1 All ER 433. **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA. **Dictum of MacKenna J applied,** *Synaptek Ltd v Young* [2003] ICR 1149

Red Bank Manufacturing Co Ltd v Meadows [1992] ICR 204, EAT. **Disapproved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Reed v Stedman [1999] IRLR 299, EAT. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Reid v Rush & Tompkins Group plc [1990] ICR 61; [1990] 1 WLR 212; [1989] 3 All ER 228, CA. **Considered,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Reisebüro Broede v Sandker (Case C-3/95) [1996] ECR I-6511, 6537–6538, para 28, ECJ. **Dicta applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Reuben v Brent London Borough Council [2000] ICR 102, EAT. **Approved,** *Tran v Greenwich Vietnam Community Project* [2002] ICR 1101, CA. **Doubted,** *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA

Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E)

Rhys-Harper v Relaxion Group plc [2000] IRLR 810, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 1176, CA

Rhys-Harper v Relaxion Group plc [2001] ICR 1176, CA. **Decision of the Court of Appeal reversed** [2003] ICR 867, HL(E)

Rhys-Harper v Relaxion Group plc [2001] ICR 1176, 1178–1179, CA. **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT. **Considered,** *Jones v 3M Healthcare Ltd* [2002] ICR 341, EAT. **Observations of Pill LJ explained,** *Jones v 3M Healthcare Ltd* [2002] ICR 1124, CA

Rhys-Harper v Relaxion Group plc [2003] ICR 867; [2003] 4 All ER 1113, HL(E). **Applied,** *Metropolitan Police Service v Shoebridge* [2004] ICR 1690, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT; *Woodward v Abbey National plc (No 1)* [2005] ICR 1750, EAT

Robinson v British Island Airways Ltd [1978] ICR 304, EAT. **Considered,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Robinson v Post Office [2000] IRLR 804, EAT. **Followed,** *Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA

Rockfon A/S v Specialarbejderforbundet i Danmark (Case C-449/93) [1996] ICR 673; [1995] ECR I-4291, ECJ. **Applied,** *MSF v Refuge Assurance plc* [2002] ICR 1365, EAT

Rookes v Barnard [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367, HL(E). **Considered,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT

Rose v Plenty [1975] ICR 430, 437; [1976] 1 WLR 141; [1976] 1 All ER 97, CA. **Dicta of Scarman LJ applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Rossiter v Pendragon plc [2001] ICR 1265, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 1063, CA

Rovenska v General Medical Council [1998] ICR 85, 94, CA. **Dicta of Brooke LJ applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1990] 1 Med LR 328, CA. **Not followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Royal Society for the Protection of Birds v Croucher [1984] ICR 604, EAT. **Considered,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA

Rubenstein v McGloughlin [1997] ICR 318, EAT. **Not followed,** *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, EAT

Rutherford v Owens-Illinois Inc (1997) 67 Cal Rptr 2d 16. **Considered,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 798, HL(E)

Rutten v Cross Medical Ltd (Case C-383/95) [1997] ICR 715; [1997] ECR I-57, ECJ. **Considered,** *Weber v Universal Ogden Services Ltd* (Case C-37/00) [2002] ICR 979, ECJ

Saeed v Royal Wolverhampton Hospitals NHS Trust [2000] Lloyd's Rep Med 331. **Decision of Gage J affirmed** [2001] ICR 903, CA

Saeed v Royal Wolverhampton Hospitals NHS Trust [2001] ICR 903, CA. **Applied,** *Skidmore v Dartford & Gravesham NHS Trust* [2002] ICR 403, CA. **Considered,** *Skidmore v Dartford & Gravesham NHS Trust* [2003] ICR 721, CA

Saggar v Ministry of Defence [2004] ICR 1708, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 1073, CA

Sainsbury (J) Ltd v Savage [1981] ICR 1, CA. **Considered,** *Roberts v West Coast Trains Ltd* [2005] ICR 254, CA

St Basil's Centre Ltd v McCrossan [1992] ICR 140, EAT. **Considered,** *Consignia plc (formerly The Post Office) v Sealy* [2002] ICR 1193, CA

Sajid v Sussex Muslim Society [2002] IRLR 113, CA. **Considered,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Saligueira da Silva Mouta v Portugal [2001] 1 FCR 653, ECHR. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess

Sandoz prodotti farmaceutici SpA v Commission of the European Communities (Case C-277/87) (Summary publication) [1990] ECR I-45, ECJ. **Distinguished,** *Bayer AG v Commission of the European Communities* (Case T-41/96) [2001] ICR 735, CFI

Savory v Holland & Hannen & Cubitts (Southern) Ltd [1964] 1 WLR 1158; [1964] 3 All ER 18, CA. **Considered,** *Makepeace v Evans Bros (Reading)* [2001] ICR 241, CA

Sawyer v Ahsan [2000] ICR 1, EAT. **Considered,** *Secretary of State for Scotland v Mann* [2001] ICR 1005, EAT (Sc). **Overruled,** *Ali v McDonagh* [2002] ICR 1026, CA

Scally v Southern Health and Social Services Board [1991] ICR 771; [1992] 1 AC 294; [1991] 3 WLR 778; [1991] 4 All ER 563, HL(NI). **Applied,** *Outram v Academy Plastics Ltd* [2001] ICR 367, CA. **Distinguished,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Schmidt v Spar- und Leihkasse der früheren Amter Bordersholm, Keil und Cronshagen (Case C-392/92) [1995] ICR 237; [1994] ECR I-1311, ECJ. **Considered,** *Dudley Bower Building Services Ltd v Lowe* [2003] ICR 843, EAT

Scotford v SmithKline Beecham [2002] ICR 264, EAT. **Distinguished,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Disapproved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA

Secretary of State for Employment v Mann [1999] ICR 898, HL(E). **Considered,** *Titchener v Secretary of State for Trade and Industry* [2002] ICR 225, EAT

Secretary of State for Trade and Industry v Bottrill [1999] ICR 592; [2000] 1 All ER 915, CA. **Followed,** *Connolly v Sellers Arenascene Ltd* [2001] ICR 760, CA

Secretary of State for Trade and Industry v Rutherford (No 2) [2005] ICR 119, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 119, EAT and CA

Selfridges Ltd v Malik [1998] ICR 268, EAT. **Approved,** *Parry v National Westminster Bank plc* [2005] ICR 396, CA

Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT. **Considered,** *Street v Derbyshire Unemployed Workers' Centre* [2004] ICR 213, EAT

Shamoon v Chief Constable of the Royal Ulster Constabulary [2001] IRLR 520, CA(NI). **Decision of the Court of Appeal in Northern Ireland affirmed on different grounds** [2003] ICR 337, HL(NI)

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337; [2003] 2 All ER 26, HL(NI). **Aplied,** *Fletcher v NHS Pensions Agency* [2005] ICR 1458, EAT. **Distinguished,** *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT

Sheffield v Oxford Controls Ltd [1979] ICR 396, EAT. **Followed,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT

Shepherd (F C) & Co Ltd v Jerrom [1985] ICR 552, EAT. **Considered,** *Rai v Somerfield Stores Ltd* [2004] ICR 656, EAT

Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170, 1178–1179, para 22, CA. **Dictum of Stuart-Smith LJ applied,** *Essa v Laing Ltd* [2003] ICR 1110, EAT; [2004] ICR 746, CA

Sian v Abbey National plc [2004] ICR 55, EAT. **Approved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Sidhu v Aerospace Composite Technology Ltd [1999] IRLR 683, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 167, CA

Sim v Rotherham Metropolitan Borough Council [1986] ICR 897, 935–936; [1987] Ch 216; [1986] 3 WLR 851; [1986] 3 All ER 387. **Dicta of Scott J considered,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Simmons v British Steel plc 2003 SLT 62. **Decision of the Second Division of the Inner House of the Court of Session affirmed on different grounds** [2004] ICR 585, HL(Sc)

Simper (Peter) & Co Ltd v Cooke [1986] IRLR 19, EAT. **Distinguished,** *Southwark London Borough Council v Jiminez* [2003] ICR 1176, CA

Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad y Consumo de la Generelidad Valenciana (Case C-303/98) [2001] ICR 1116; [2001] All ER (EC) 609; [2000] ECR I-7963, ECJ. **Applied,** *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528, ECJ; *Pfeiffer v Deutsches Rotes Kreuz, Kreisverbvand Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ. **Considered,** *Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services)* [2005] ICR 673, CA

Skidmore v Dartford & Gravesham NHS Trust [2001] ICR 911, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 403, CA

Skidmore v Dartford & Gravesham NHS Trust [2002] ICR 403, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 721, HL(E)

Skyrail Oceanic Ltd v Coleman [1981] ICR 864, 873, CA. **Applied,** *Chamberlin v Emokpae* [2004] ICR 1476, EAT. **Dictum of Lawton LJ not followed,** *Essa v Laing Ltd* [2003] ICR 1110, EAT

Smith v Gardner Merchant Ltd [1999] ICR 134; [1998] 3 All ER 852, CA. **Followed,** *Macdonald v Ministry of Defence* [2002] ICR 174, Ct of Sess. **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA. **Considered,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc). **Not followed,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Smith v United Kingdom (1999) 29 EHRR 493. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess

Sogbetun v Hackney London Borough Council [1998] ICR 1264, EAT. **Not followed,** *Morgan v Brith Gof Cyf* [2001] ICR 978, EAT

South Ayrshire Council v Morton [2001] IRLR 28, EAT(Sc). **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 956, Ct of Sess

South Central Trains Ltd v Rodway [2005] ICR 75, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 1162, CA

Southwark London Borough Council v Bartholomew [2004] ICR 358, EAT. **Considered,** *Cooke v Glenrose Fish Co* [2004] ICR 1188, EAT

Southwark London Borough Council v Whillier [2001] ICR 142, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 1016, CA

Spijkers v Gebroeders Benedik Abattoir CV (Case 24/85) [1986] ECR 1119, 1128–1129, ECJ. **Dicta applied,** *RCO Support Services Ltd v UNISON* [2002] ICR 751, CA

Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers [1980] ICR 31; [1980] 1 All ER 231, EAT. **Overruled,** *Susie Radin Ltd v GMB* [2004] ICR 893, CA

Spring v Guardian Assurance plc [1994] ICR 596, 612, 647; [1995] 2 AC 296; [1994] 3 WLR 354; [1994] 4 All ER 563, HL(NI). **Dicta of Lord Goff of Chieveley applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA. **Considered,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA. **Dicta of Lord Woolf considered,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Staffordshire County Council v Barber [1996] ICR 379; [1996] 2 All ER 748, CA. **Distinguished,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Stokes v Guest, Keen & Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776. **Applied,** *Barber v Somerset County Council* [2004] ICR 457, HL(E)

Strathclyde Regional Council v Wallace [1998] ICR 205, 212; [1998] 1 WLR 259; [1998] 1 All ER 394, HL(Sc). **Dicta of Lord Browne-Wilkinson considered,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

Street v Derbyshire Unemployed Workers' Centre [2004] ICR 213, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 97, CA

Sutcliffe v Hawker Siddeley Aviation Ltd [1973] ICR 560, NIRC. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice (Case C-13/95) [1997] ICR 662, 670, para 12; [1997] ECR I-1259, ECJ. **Dicta applied,** *Liskojärvi v Oy Liikojärvi Ab* (Case C-172/99) [2002] ICR 155, ECJ. **Considered,** *RCO Support Services Ltd v UNISON* [2002] ICR 751, CA

T, Petitioner 1997 SLT 734. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades [1977] ICR 833; [1978] 1 WLR 558; [1978] 2 All ER 649, EAT. **Overruled,** *Susie Radin Ltd v GMB* [2004] ICR 893, CA

Tarnesby v Kensington and Chelsea and Westminster Area Health Authority (Teaching) [1981] ICR 615, HL(E). **Distinguished,** *R (Dorling) v Sheffield City Council* [2003] ICR 424

Tattari v Private Patients Plan Ltd [1998] ICR 106, CA. **Applied,** *Ali v McDonagh* [2002] ICR 1026, CA

Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoomaakbedriff (Case C-109/91) [1995] ICR 74; [1993] ECR I-4879, ECJ. **Applied,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT

Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland (Case C-18/95) [1999] ICR I-345, 391, para 45, ECJ. **Dicta applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Thomas v Times Book Co Ltd [1966] 1 WLR 911; [1966] 2 All ER 241. **Distinguished,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Thrells Ltd v Lomas [1993] 1 WLR 456; [1993] 2 All ER 546. **Considered,** *BEC Pension Trustee Ltd v Sheppeck* [2002] ICR 1343

Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249. **Distinguished,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

Tinsley v Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65, HL(E). **Considered,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA

Tipp-Ex GmbH & Co KG v Commission of the European Communities (Case C-279/87) (Summary publication) [1990] ECR I-261, ECJ. **Distingushed,** *Bayer AG v Commission of the European Communities* (Case T-41/96) [2001] ICR 735, CFI

Todd v British Midland Airways Ltd [1976] ICR 959, CA. **Considered,** *Crofts v Cathay Pacific Airways Ltd* [2005] ICR 1436, CA

Toshoku Finance UK plc, In re [2002] 1 WLR 671; [2002] 3 All ER 961, HL(E). **Considered,** *In re Allders Department Stores Ltd* [2005] ICR 867

Tran v Greenwich Vietnam Community Project [2002] ICR 1101, CA. **Considered,** *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103, EAT; *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA

Transport & General Workers' Union v Mckinnon, J R Haulage Ltd [2001] ICR 1281, EAT (Sc.). **Not followed,** *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829, EAT

Trapp v Mackie [1979] 1 WLR 377, 379; [1977] 1 All ER 489, HL(Sc). **Dicta of Lord Diplock applied,** *Heath v Comr of Police of the Metropolis* [2005] ICR 329, CA

Trotman v North Yorkshire County Council [1999] LGR 584, CA. **Overruled,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Tyldesley v TML Plastics Ltd [1996] ICR 356, EAT. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123

UK Waste Control Ltd v Wren [1995] ICR 974, EAT. **Approved,** *Alderson v Secrectary of State for Trade and Industry* [2004] ICR 512, CA

UPS Europe SA v Commission of the European Communities (Case T-175/99) [2002] ECR II-1915, CFI. **Considered,** *Getmapping plc v Ordnance Survey* [2003] ICR 1

United Arab Emirates v Abdelghafar [1995] ICR 65, EAT. **Considered,** *Peters v Sat Katar Co Ltd* [2003] ICR 1574, CA; *Khudados v Leggate* [2005] ICR 1013, EAT

University of Huddersfield v Wolff [2004] ICR 828, para 26, EAT. **Observations of Burton J considered,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

University of Manchester v Jones [1993] ICR 474, CA. **Applied,** *Lord Chancellor v Coker* [2001] ICR 507, EAT

University of Nottingham v Eyett [1999] ICR 721; [1999] 2 All ER 437. **Approved,** *Outram v Academy Plastics Ltd* [2001] ICR 367, CA

University of Nottingham v Eyett (No 2) [1999] ICR 730; [1999] 1 WLR 594; [1999] 2 All ER 445. **Not followed,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Vakante v Governing Body of Addey and Stanhope School (No 2) [2004] ICR 279, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 231, CA

Venables v Hornby [2002] ICR 81. **Decision of Lawrence Collins J reversed** [2003] ICR 186, CA

Venables v Hornby [2003] ICR 186, CA. **Decision of the Court of Appeal reversed** [2004] ICR 42, HL(E)

Vento v Chief Constable of the West Yorkshire Police [2003] ICR 318, CA. **Followed,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA. **Applied,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT; *Scott v Inland Revenue Comrs* [2004] ICR 1410, CA

Vicary v British Telecommunications plc [1999] IRLR 680, EAT. **Considered,** *Abadeh v British Telecommunications plc* [2001] ICR 156, EAT

Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg (Case C-340/89) [1991] ECR I-2357, ECJ. **Applied,** *Conseil National de l'Ordre des Architectes v Dreessen* (Case C-31/00) [2002] ICR 1227, ECJ

Wadi v Cornwall and Isles and Scilly Family Practitioner Committee [1985] ICR 492, EAT. **Followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Waite v Government Communications Headquarters [1983] ICR 653; [1983] 2 AC 714; [1983] 3 WLR 389; [1983] 2 All ER 1013, HL(E). **Considered,** *Wall v British Compressed Air Society* [2004] ICR 408, CA

Walker v Northumberland County Council [1995] ICR 702. **Approved,** *Hatton v Sutherland* [2002] ICR 613, CA

Wallace v C A Roofing Services Ltd [1966] IRLR 435. **Considered,** *Whitely v Marton Electrical Ltd* [2003] ICR 495, EAT

Walton v Independent Living Organisation Ltd [2002] ICR 1406, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 688, CA

Waters v Comr of Police of the Metropolis [2000] ICR 1064; [2000] 1 WLR 1607; [2000] 4 All ER 934, HL(E). **Applied,** *Banks v Ablex Ltd* [2005] ICR 819, CA

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- 1870 **Apportionment Act** (33 & 34 Vict c 35)
  - s 2: Item Software (UK) Ltd v Fassihi [2005] ICR 450, CA
- 1890 **Partnership Act** (53 & 54 Vict c 39)
  - s 5: Dave v Robinska [2003] ICR 1248, EAT
- 1925 **Trustee Act** (15 & 16 Geo 5, c 19)
  - s 15: Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc [2002] ICR 1427
- 1933 **Children and Young Persons Act** (23 Geo 5, c 12)
  - ss 18, 30(1) (as amended): Addison (trading as Brayton News) v Ashby [2003] ICR 667, EAT
- 1945 **Law Reform (Contributory Negligence) Act** (8 & 9 Geo 6, c 28)
  - s 1(1): Anderson v Newham College of Further Education [2003] ICR 212, CA
- 1947 **Crown Proceedings Act** (10 & 11 Geo 6 c 44)
  - s 10: Matthews v Ministry of Defence [2002] ICR 1003, CA; [2003] ICR 247, HL(E)
- 1949 **British Transport Commission Act** (12 & 13 Geo 6, c xxix)
  - s 53(1) (as amended): Spence v British Railways Board [2001] ICR 232, EAT
- 1953 **Registration Service Act** (1 & 2 Eliz 2, c 37)
  - s 6(4): Lincolnshire County Council v Hopper [2002] ICR 1301, EAT
- 1957 **Occupiers' Liability Act** (5 & 6 Eliz 2 c 31)
  - s 2: Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412, CA
    - McCook v Lobo [2003] ICR 89, CA
- 1970 **Equal Pay Act** (c 41)
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  - s 1(1), Sch 1, para 8(1): Kirton v Tetrosyl Ltd [2003] ICR 37, 1237, CA
  - s 1(1)(2) (as amended): Alabaster v Barclays Bank plc (formerly Woolwich plc) [2005] ICR 1246, CA
  - ss 1(1)(2), 2(4) (as substituted): Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT
  - s 1(3) (as substituted): Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT
    - Nelson v Carillion Services Ltd [2003] ICR 1256, CA
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  - s 1(6) (as amended): Allonby v Accrington and Rossendale College [2001] ICR 1189, CA
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  - ss 2(1)(4) (as substituted), 2ZA(2)(3) (as inserted): Newcastle upon Tyne City Council v Allan [2005] ICR 1170, EAT
  - s 2(4) (as amended): Preston v Wolverhampton Healthcare NHS Trust (No 2) [2001] ICR 217, HL(E)
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  - ss 54(1), 56(1), 57: Essa v Laing Ltd [2003] ICR 1110, EAT
  - s 98(4): X v Y [2003] ICR 1138, EAT
- 1972 **European Communities Act** (c 68)
  - s 2(2): NUMAST v P & O Scottish Ferries Ltd [2005] ICR 1270, EAT(Sc)
- **Local Government Act** (c 70)
  - s 112(2): Nicholls v Greenwich London Borough Council [2003] ICR 1020, CA
- 1973 **Matrimonial Causes Act** (c 18)
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- 1974 **Health and Safety at Work etc Act** (c 37)
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s 6(2): Halfpenny v IGE Medical Systems Ltd [2001] ICR 73, HL(E)
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s 14 (as substituted): Fletcher v Blackpool NHS Pensions Agency [2005] ICR 1458, EAT
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s 66(4): Orthet Ltd v Vince-Cain [2005] ICR 374, EAT
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1981 **Supreme Court Act** (c 54)
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s 193(1), Sch 12, para 3(2A) (as inserted): Clark v Perks (No 2) [2002] ICR 302, CA
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1992 **Social Security Administration Act 1992** (c 5)
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Robert Fletcher (Greenfield) Ltd v Blakeman; 20 November 2001; EAT/767/00 .... 2002/4
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Soutar (Gary) (Executors of) v James Murray & Co (Cupar) Ltd; 7 November 2001; EAT/592/01 .... 2002/2

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on Goetz v St George's Healthcare NHS Trust; 18 October 2001; EAT/1395/97 2002/3

Warren v S & N Pubs and Restaurants Ltd; 29 October 2002; EAT/1376/01 2003/3
Whitmore v Inland Revenue Comrs; 1 April 2003; EAT/727/02 2003/11
Wight v East Riding of Yorkshire Council; 18 April 2002; EAT/101/01 2002/7
Wildgoose v Rampton Hospital Authority; 17 December 2001; EAT/977/00 2002/5
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Willie v Companies House; 3 August 2001; EAT/652/00 2002/1
Wright v Scottbridge Construction Ltd; 4 April 2001; EAT/1050/00 2001/8

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Young v Timbmet Ltd; 13 July 2000; EAT/667/99 2001/3

Zaiwalla & Co v Walia; 24 July 2002; EAT/827/00 2002/13
Zalzala v Sheffield University; 21 November 2000; EAT/976/99 2001/3
Zalzala v Sheffield University; 29 November 2002; EAT/201/01 2003/5

RECENT POINTS

Points of interest in the Employment Appeal Tribunal not calling for a full report in ICR

[2001] ICR Part 1

BREACH OF CONTRACT

Employees brought claims for breach of contract in relation to their employers' refusal to pay discretionary bonuses which had been decided on by the employers but which were withheld after the employees gave notice to terminate their employment. An employment tribunal upheld the claims on the ground that, the employers having exercised their discretion in the employees' favour, it had been unreasonable to change their mind and in breach of the implied term not to carry out an act calculated to undermine trust and confidence between employer and employee.

JUDGE PETER CLARK, allowing an appeal by the employers and remitting the matter for rehearing, said that in *Clark v Nomura International Plc* (unreported) 6 September 2000, Burton J had recognised that an employer's discretion to pay a bonus was not unfettered. The decision not to pay must not be capricious. Burton J had approached the matter on the footing that an employer could not exercise his discretion, by refusing to pay a bonus, perversely in the *Wednesbury* sense. That was not to say that such an employer acted unreasonably but that no reasonable employer would have reached the same conclusion acting in accordance with his contractual obligations. The employment tribunal had approached the implied term on the basis that a reasonable employer would not have withheld the bonuses, which had been determined but not declared to the employees, on the ground that they were shortly to leave the employers' employment. That was an impermissible approach. The discretion vested in the employers had to be exercised in good faith and not capriciously. The question of whether the employers acted in breach of the implied term was a decision for the fact-finding tribunal once all the necessary primary facts had been found.

Manor House Healthcare v Hayes; 16 October 2000; EAT/1196/99
EAT: Judge Peter Clark, Mr P Dawson and Mrs A Gallico

DISABILITY DISCRIMINATION

The applicant, who had a history of mental illness, had his application to become a trainee voluntary adviser with a citizens' advice bureau rejected. On his complaint of disability discrimination under section 4(1)(a) of the Disability Discrimination Act 1995, an employment tribunal found that it had no jurisdiction to hear the complaint, because the applicant had not applied for "employment" as defined by section 68 of the Act, since the volunteer adviser post and the training programme did not fall within that definition.

JUDGE WILKIE QC, allowing an appeal by the applicant, said that any tribunal, looking at the document the applicant would have been required to sign and concluding that there was no obligation on either party, must have either misdirected itself as to the law or completely failed to understand the document. Further, by apparently regarding the absence of pay as the crucial factor, rather than one of a number of factors to be weighed in the balance, the tribunal erred in law. In saying that expenses could not equate to pay or remunerated employment, while no doubt accurately categorising expenses as opposed to payment and remuneration, the tribunal, in so far as it was seeking to rely on that as supporting a conclusion that it was not a contractual agreement with mutually binding obligations, was again misdirecting itself. But the mere fact that the document amounted to a legal binding contract if entered into did not in itself mean that the tribunal had jurisdiction, because the contract had to be either a contract of service or a contract personally to do any work. The tribunal had not addressed the question whether it was such a contract or was no more than a contract simply to undergo training in the manner prescribed. To come to a conclusion on that issue, the tribunal would have to receive evidence of what happened under such an agreement in terms of the mix between formal training, supervision and work performed during the training period. Accordingly, the matter would have to be remitted. Should the employment tribunal conclude that the agreement was a contract for training rather than a contract within section 68, the applicant would seek to argue that the refusal of the applicant's application was contrary to section 4(1)(a) of the 1995 Act, in that admission to the training programme was part of the "arrangements which [the citizens' advice bureau] makes for the purpose of determining to whom [it] should offer employment". The words of section 4(1)(a) were wide, and, if arrangements were to determine to whom employment generally should be offered, such a training programme was capable of being covered by the subsection. The satisfactory completion of the programme was a first stage in a potentially seamless process at the end of which was an offer of employment as a voluntary adviser. Whether that was the case would depend on the evidence.

Murray v Newham Citizens' Advice Bureau; 6 July 2000; EAT/1096/99
EAT: Judge Wilkie QC, Mr J R Crosby and Miss G Mills

EMPLOYEE

The applicant responded to an advertisement to work with M Ltd and worked at its plant, subject to its control, until M Ltd suspended the applicant and then "decided to terminate his assignment". On the applicant's complaint of unfair dismissal, M Ltd submitted that the applicant was an employee of MC Ltd and a "temporary worker" for M Ltd under a contract for services. MC Ltd carried on business in the nature of an employment agency, and supplied selected individuals to M Ltd pursuant to an "operating agreement for the supply of temporary workers" which required it to conduct a recruitment process specified by M Ltd. The employment tribunal decided, as a preliminary issue, that the applicant was an employee of M Ltd.

LINDSAY J, dismissing an appeal by M Ltd, said that, since M Ltd had limited its argument on appeal to the second component of a contract of service, namely control, the principal question was whether the employment tribunal erred in law in concluding that as between M Ltd and the applicant there existed the right of the former to control the latter to a degree sufficient to enable the tribunal properly to regard M Ltd as the employer and the applicant as its employee. Reference was made to dicta of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515. Although MacKenna J spoke of control in terms of *rights*, there was no good reason to ignore practical aspects of control that fell short of direct legal rights. The employment tribunal had held that the control of what the applicant did on a day to day business lay with M Ltd. It would be unreal to ignore the existence of that practical degree of control simply because a direct legal right did not lie in M Ltd under a contract it had made with the applicant. It did not necessarily disprove A's control to a given degree by proving that B had similar or greater powers of control. The sanctions available against the applicant were so akin to the sanction an employer would have against an employee that one could not say that the control exercisable by M Ltd was not "in a sufficient degree to make one party the master and the other his servant". There was no error of law in the employment tribunal decision.

Motorola Ltd v Davidson; 18 May 2000; EAT/46/00
EAT(Sc): Lindsay J, Mr A J Ramsden and Mrs T Marsland

EVIDENCE

During the hearing of complaints by two employees that they had been unfairly dismissed on the ground of misconduct pursuant to statements made by fellow employees given on the basis that the makers would remain anonymous, the employment tribunal refused to disallow a question to be put to an employer's witness as to the possible identity of one of the statement makers. The tribunal also indicated that it was prepared to compel the production of documents understood to be the statements in question.

LORD JOHNSTON, allowing an appeal by the employer, said that the issue created a clash of two irreconcilable principles: on the one hand, the need for there to be a full and fair investigation of the case on both sides, and, on the other hand, the legitimate attempt by the employer to honour a pledge given to employees who had given statements in confidence. From *Science Research Council v Nasse* [1979] ICR 921 it had to be taken that there was no absolute in either respect. That case would seem to suggest that, if possible, compromises should first be attempted. *Hussain v Elonex Plc* [1999] IRLR 420 pointed to the fundamental need in terms of natural justice for the employee to know the case he faced and, if that could not be done without handing over confidential documents, that must be done. It did not follow, however, that such was necessary if by other means the employee was aware of the case against him. In the present case the tribunal had reached its decisions on the basis that to do otherwise was to delegate or abandon the judicial duty to investigate the matter, in deference to a decision of the employer. Whether an attempt had been made to consider whether parts of the statements should be deleted was not entirely clear, but the appeal tribunal had been told that it was not practicable to do so without destroying the substance of the statements. Accordingly, a compromise, which should if at all possible be effected, did not appear to be possible. The tribunal had misdirected itself by determining the matter solely on the question of abrogation or abandonment of the judicial role. Where, in a case such as the present, an employer had given adequate notice to employees of the case against them by other means, it was legitimate for the employer to honour a pledge of anonymity if a compromise was not possible. The result might be that the best evidence was not led, but no doubt the tribunal would take that into account in considering how far the employer had succeeded in discharging the onus of establishing the reason for dismissal and the adequacy of the investigation into that reason.

Charnos Plc v Donnelly; 27 July 2000; EAT/334/00
EAT(Sc): Lord Johnston, Mr A J Ramsden and Mr R P Thomson

ILLEGALITY

From 1996 until June 1997 the applicant, at his own request, worked ostensibly as a consultant, presenting invoices and receiving his salary gross and paying national insurance contributions as a self-employed person, while in fact working as an employee. From July 1997 until his dismissal in December 1998 he was paid with deductions made at source. On his complaint of unfair dismissal, the employment tribunal found, as a preliminary point, that the documents did not show that tax and insurance contributions had been avoided; that the contract of employment was not tainted with illegality; and that the applicant was entitled to rely on the period before July 1997 in computing his period of continuous employment, in order to pursue his complaint.

JUDGE REID QC, allowing an appeal by the employers, said that payment of wages free of tax did not necessarily render a contract of employment illegal and void, but the manner of performance, for example, the production of false documents, might do so. Whether an employee was affected by such illegality would depend on the state of his knowledge. On the face of the documents before the employment tribunal, contrary to the finding of that tribunal, the applicant had not conducted his tax affairs properly. The documents disclosed that he had failed to make tax returns and had paid tax on the basis not of his earnings but of a much lower income. It was also apparent that he paid far less by way of national insurance contributions than he should have done on the basis of his earnings as an employed person. The tribunal's findings were unsustainable. The material before the appeal tribunal was consistent only with an intention to defraud the revenue by purporting to be self-employed when he was in fact employed. There was no evidence that he had ever paid the tax he should have done. The tribunal's decision must be discharged, but, since there might have been material not rehearsed in the tribunal's summary reasons which had influenced their decision, the case would be remitted for rehearing.

Beauvale Furnishings Ltd v Chapman; 29 November 2000; EAT/79/00
EAT: Judge Reid QC, Mr B Fitzgerald and Ms G Mills

TIME LIMIT

A complaint that the applicant had been unlawfully expelled from his union, contrary to section 174(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, was presented to an employment tribunal more than six months after his expulsion. The tribunal held that he was entitled to pursue his claim on the ground that, for the purposes of section 175, it was "not reasonably practicable" for him to have presented the complaint in time when he had been pursuing an internal appeal in accordance with the union's procedures pursuant to advice given him by a citizens' advice bureau.

SIR CHRISTOPHER BELLAMY QC, allowing an appeal by the union and dismissing the complaint, said that the words "not reasonably practicable" were, in principle, to be given the same meaning whenever they appeared in an equivalent context in comparable legislation. The wording of section 175(b) of the 1992 Act was the same as section 111(2)(b) of the Employment Rights Act 1996, which dealt with the time limit in cases of unfair dismissal. That section was itself worded identically to its predecessor sections. Parliament could have, but had not, chosen to adopt different words as it did when adopting the wider test provided under section 68(6) of the Race Relations Act 1976, which provided that a complaint presented out of time might none the less be considered by a tribunal if it considered that it was "just and equitable" to do so. Moreover, Parliament must be presumed to have known, when enacting the 1992 Act, of the meaning given to the words "not reasonably practicable" by previous decisions of the courts. It followed that the employment tribunal had given insufficient weight to previous decisions concerning the interpretation of those words in the context of time limits under other statutes. The Employment Appeal Tribunal had held in *Bodha v Hampshire Area Health Authority* [1982] ICR 200, 205 that the fact that an employer's internal appeal procedure had not been exhausted did not render it "not reasonably practicable" to present a complaint within the time limit. As regards the tribunal's reliance on "inaccurate advice" the applicant was said to have obtained from the citizens' advice bureau, the fact that an applicant received incorrect advice from a citizens' advice bureau or other adviser did not in law justify the conclusion that it was "not reasonably practicable" to present a complaint within the relevant time limit.

GMB v Hamm; 15 November 2000; EAT/246/00
EAT: Sir Christopher Bellamy QC, Mr J R Crosby and Mr G H Wright

CONSTRUCTIVE DISMISSAL

An employee, who went on sick leave suffering from anxiety and depression following a decision to demote her, resigned after her employers insisted that her appeal against the demotion would not be heard until she was fit to return to work. An employment tribunal rejected her claim that she had been constructively dismissed on the ground that it was a reasonable response by the employers to delay the appeal until she was fit and they were not in breach of the implied term of mutual trust and confidence.

BELL J, allowing an appeal by the employee, said that for there to be a constructive dismissal the delay in the appeal process, which was the sole reason for the employee's resignation, had to be a significant breach of contract entitling her to treat herself as discharged from her contract of employment. The test of breach of the implied term was whether the employer had acted in a manner calculated or likely to destroy or undermine the relationship of trust and confidence. While that test was contractual, the question of whether the employer had acted reasonably was not wholly irrelevant. It might be of evidential value in deciding whether there had been a breach of the implied term by the employer and whether any breach was sufficiently serious to entitle the employee to consider herself as discharged. The tribunal had thought it useful to ask itself whether the employers had acted reasonably, when judging whether the delay put the employers in breach of the implied term and to such a degree as to justify resignation. It was entitled to take that approach and to decide that the employers acted reasonably and were not in breach of the implied term. However, the employee's case was that the employers' delay in hearing her appeal was a significant breach of an express term of her contract, which provided that appeals had to be heard as soon as was "practicable". The word "practicable" was not to be taken to mean simply "capable of being done". Adopting what was said by May LJ in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372, 384H, and reading "practicable" as the equivalent "feasible" was a good working approach to its meaning and application. The tribunal had misdirected itself in asking whether the employers had acted reasonably in not hearing the appeal by the time the employee resigned, though that might have been because of confusion as to the applicability of the express term. The matter would be remitted to the same tribunal to decide whether the employers were in breach of the express term and, if so, whether the nature of the breach was sufficiently serious to amount to constructive dismissal.

Devoy v World Duty Free (Europe) Ltd; 27 November 2000; EAT/59/00
EAT: Bell J, Mr D J Hodgkins and Mr H Singh

COSTS

An employment tribunal made an order, under rule 12(3)(c) of the Employment Tribunals Rules of Procedure 1993, for the applicant to pay the costs incurred by the respondent in respect of the preparation and conduct of the full merits hearing of his complaint without making an inquiry as to his means.

JUDGE WILSON, dismissing an appeal by the applicant, said that in *Benyon v Scadden* [1999] IRLR 700 the appeal tribunal had held, contrary to the view expressed in *Omar v Worldwide News Inc* [1998] IRLR 29, that there was no requirement for a tribunal to look at an applicant's personal means before making an order for costs against him. Indeed, the appeal tribunal in *Benyon* was unable to agree with the decision in *Omar* that only in exceptional circumstances should a tribunal consider the means of a party's trade union in making an order for costs. That would place an unjustified fetter on the tribunal's discretion to award costs, given the unrestricted terms in which the discretion was conferred by the Rules. It was preferable to follow the *Benyon* line because the *Omar* facts were not present and because, when dealing with the matter, the chairman of the employment tribunal had said that it was submitted that, with one or two minor exceptions, the applicant's complaints were completely misconceived and that the applicant's representative had received in excess of 10 warnings as to his conduct of the applicant's case. The applicant had been present at the hearing and his representative was to be taken to have had the applicant's authority in the way he conducted the proceedings.

Lilburne-Byford v Essex County Council; 13 November 2000; EAT/264/98
EAT: Judge H Wilson, Mr J R Crosby and Mr N D Willis

DISCOVERY

An applicant's request for further and better particulars of the notice of appearance was refused by an employment tribunal chairman on the ground that the respondent's case was sufficiently well pleaded. Further requests by the applicant for documents were also refused on the ground that they were not necessary to dispose of the issue between the parties.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that the applicant contended that, while the tribunal chairman had acted within the powers of her discretion, the review of such discretion by he appellate court was unfettered, and he referred to *British Library v Palyza* [1984] IRLR 306, para 4. On the face of it, the case was authority on the basis of which it could be argued that, at appellate level, the ppeal tribunal was free to open issues of discovery and the request for further particulars as if taking the ecision afresh. The appeal tribunal had, however, been persuaded by the respondent's review of the elevant authorities that it did not have a free hand to review the decision of the chairman in respect of ither matter and was constrained to interfere only on the grounds set out, respectively, in *Bastick v James Lane (Turf Accountants) Ltd* [1979] ICR 778, 782 and *Noorani v Merseyside TEC Ltd* [1999] IRLR 185, ara 32. As to the principles on which the question of discovery, particularly in discrimination cases, was oncerned, the test was that the tribunal was satisfied that it was necessary to order certain documents to be isclosed and inspected in order fairly to dispose of the proceedings. The chairman's approach had been orrect in law and the specific decisions she made were such as a reasonable tribunal, properly directing tself, could have made.

Barber v Humphreys; 27 September 2000; EAT/560/00
EAT: Judge Wilkie QC, Mr D J Hodgkins and Ms B Switzer

SOVEREIGN IMMUNITY

On a complaint of unfair dismissal by an employee of a sovereign state, who worked at its embassy as a driver/interpreter, the employment tribunal decided that the respondent government was not immune from suit and found that the employee had been unfairly dismissed.

JUDGE PETER CLARK, allowing an appeal by the respondent government and dismissing the omplaint, said that it was common ground that the question for the tribunal was whether the applicant mployee had been a member of "the administrative and technical staff" of the mission within article 1(f) of he Vienna Convention on Diplomatic Relations (1961), set out in Schedule 1 to the Diplomatic Privileges Act 1964, for the purposes of section 16 of the State Immunity Act 1978. It was unfortunate that although he employment tribunal had been referred to *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] ICR 25 it had not been referred to the preceding case of *Arab Republic of Egypt v Gamal-Eldin* [1996] ICR 13. In *Gamal-Eldin* the Employment Appeal Tribunal, at p 23E, had held that although the applicants, who were employed as drivers, formed part of the administrative and technical staff of the mission. There was no factual distinction from the present case. The employment tribunal had given no reasons to explain why they had concluded that the applicant was not a member of the administrative and echnical staff on the facts as found. That was an error of law. As it was abundantly clear that such staff included a driver employed to transport nationals of the respondent state arriving by air and to act as their ranslator, the appropriate course was hold that the respondent had immunity from suit and to dismiss the applicant's complaint.

Government of the Kingdom of Saudi Arabia v Nasser; 26 July 2000; EAT/672/99
EAT: Judge Peter Clark, Mr P Dawson and Mrs R A Vickers

STAY OF PROCEEDINGS

An employee who claimed to have contracted repetitive strain injury and carpal tunnel syndrome as a result of his work brought a complaint, in August 1998, of disability discrimination alleging that his mployer had failed to make reasonable adjustments as required by section 6 of the Disability Discrimination Act 1995. In July 1999 the proceedings were stayed pending the issue of High Court roceedings by the employee claiming damages for personal injury. In April 2000 the tribunal called a irections hearing and the complaint was listed for hearing in September 2000. The following month the mployee issued proceedings in the High Court and sought a stay of the tribunal proceedings to which the mployers consented. The tribunal chairman refused a stay on the ground that it was not in the interests of ustice that the complaint should be further delayed.

JUDGE PETER CLARK, allowing an appeal by the employee and substituting an order staying the ribunal proceedings, said that the appeal was supported by the employers who submitted that the mployee's two claims arose out of the same facts. The appeal tribunal had no general power of review of mployment tribunal interlocutory orders and could only interfere where an error of law was made out. In ractice that meant an appellant had to pass the *Wednesbury* test. It was submitted, first, that, although he tribunal was entitled, indeed obliged in the interests of the proper administration of justice, to consider he question of delay in disposing of proceedings, the chairman had, on the face of his reasons, failed to ake into account a relevant factor, namely, that the respondent employers had consented to a stay: see *First Castle Electronics Ltd v West* [1989] ICR 72, 77E. There was, it was submitted, no prejudice to the arties by the delay when both agreed that it was appropriate that the High Court proceedings should be eard first. Secondly, it was submitted that the chairman had misunderstood the potential embarrassment o the High Court judge hearing the personal injury action if material findings of fact, binding on him under the issue estoppel principle, were made by the employment tribunal. In the judgment of the appea tribunal, both submissions were made good, and the chairman's decision was flawed as a matter of law.

Tahir v Cyberlife Technology Ltd; 27 July 2000; EAT/871/00
EAT: Judge Peter Clark, Lord Davies of Coity and Mrs D M Palmer

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint that he had been unfairly dismissed for alleging that his employers had infringed a statutory right, within the meaning of section 104(1)(b) of the Employment Rights Act 1996, because he was dismissed after he had made a complaint under the employers' internal grievance procedure that his manager had refused to allow him time off for public duties contrary to section 50(2) of the Act.

BELL J, dismissing an appeal by the employee, said that the tribunal found that the reason for the employee's dismissal was his carrying out of various activities on a day's sick leave. It was common ground that the employee's use of the grievance procedure to challenge his manager's refusal to allow him more time off for his public duties amounted to an allegation that the employers had infringed a right of his which was a relevant statutory right for the purpose of section 104(1)(b). It was not contended that attending to public duties while on sick leave could amount to the assertion of a statutory right. The statutory scheme relating to unfair dismissal in Part X of the 1996 Act was different to that of race and sex discrimination and victimisation. The tribunal had to focus on "the reason" for dismissal and not the "but for" test applied in discrimination cases. The wording of section 104(1) was plain and it was difficult to do more than rehearse its express terms. It was argued that *King v Great Britain-China Centre* [1992] ICR 516 laid down an approach to the evidence in cases such as the present and that the tribunal should not say: "There is no direct evidence; that is the end of it." The appeal tribunal could not accept that submission. The guidance in that case was clearly useful in discrimination cases. But there were real differences between cases of alleged race discrimination where the complainant might be able to prove that he had been treated "less favourably" but had difficulty showing that that treatment was on racial grounds and the relatively simple question of the reason for dismissal. It was clearly common sense for the employment tribunal to examine the reason given by the employers for the employee's dismissal. The tribunal had clearly done so and considered whether it should draw the inference from the facts that the employee's assertion of his statutory right led to his dismissal. It did not infer that that was the reason, or principal reason, for the dismissal, and, given the fact that after the employee had made his complaint about time off he had compromised his grievance in agreed terms, it was entitled to come to the view it did.

Pennington v Legal Aid Board; 11 December 2000; EAT/1047/99
EAT: Bell J, Mr B Gibbs and Mr A E R Manners

UNFAIR DISMISSAL

Following an assault by a neighbour in January 1997, an employee went on sick leave. At a review hearing in December 1997 it was confirmed that she was suffering from clinical depression. She was dismissed on the grounds of her length of absence and that no time scale as to her recovery had been given. At an internal appeal the employee provided medical evidence stating that she would be fit to resume work on 30 May 1998, but the appeal hearing declined to take notice of it and confirmed her dismissal. An employment tribunal dismissed her complaint of unfair dismissal, finding that she had been fairly dismissed by reason of capability.

KEENE J, allowing an appeal by the employee, said that, on the face of it, the medical evidence was clearly relevant to the issues being considered on the internal appeal. The employment tribunal had regarded its exclusion as justified, and indeed required, by the employer's guidelines on appeals against dismissal. The appeal tribunal was of the view that those guidelines did not exclude new evidence, whether the label attached to the process was one of appeal or review. But, in any event, the normal principle was that new evidence was admissible in such internal appeals, and that must inform the construction of the guidelines. Generally, at an appeal hearing the employer would be expected to take account of anything relevant to the decision to dismiss. Putting it at its very lowest, it would take clear language in the written disciplinary procedures of an employer to justify shutting one's eyes to such further information, and it was doubtful whether even the language of such procedures could justify such an approach. Relevant new information coming into the possession of an employer on the topic of reasonableness before the appeal or review decision had been arrived at should generally be taken into account. To do otherwise would seem to fall outside the range of responses of a reasonable employer. The employment tribunal had fallen into error in misconstruing the guidelines and concluding that the appeal panel had been right to exclude the medical evidence, which was highly material to its decision, from its consideration.

Valton v Hackney London Borough Council; 14 July 2000; EAT/410/99
EAT: Keene J, Mrs A Gallico and Ms G Mills

CONTRACT OF EMPLOYMENT

An employment tribunal found that an employee's complaint that she had not been provided with a written statement of particulars of employment, in compliance with section 1 of the Employment Rights Act 1996, was well-founded, but went on to say that as her employment had terminated the tribunal made no determination in that respect.

JUDGE WILCOX, allowing an appeal by the employee, said that no formal contract of employment setting out the material terms and conditions was given to the employee in the requisite time, and after working for the employer for 12 weeks she was given one week's notice, but the employment tribunal rejected her complaint that she was dismissed for asking for her contract. There was, however, an absolute right under the statute to the terms of the contract. They had not been provided and the tribunal ought to have directed that they should be provided or found terms, certainly as to notice. The matter would be remitted to the same tribunal to consider what the contract was.

Young v Timbmet Ltd; 13 July 2000; EAT/667/99
EAT: Judge David Wilcox, Mr D J Jenkins and Mr K M Young

COSTS

An employment tribunal, having inquired into an applicant's means, decided that the applicant had acted unreasonably in failing to attend a hearing and made a costs order against him under rule 12(1) of the Employment Tribunals Rules of Procedure 1993.

MR RECORDER BURKE QC, dismissing an appeal by the applicant, said that the applicant submitted that, in deciding that he had the means to pay costs before embarking on their decision as to whether he had acted unreasonably, the tribunal had, impermissibly, considered the applicant's means as part of their consideration as to whether or not he had behaved unreasonably. There was no express requirement in the rules that an employment tribunal should take a party's means into account in deciding whether to make a costs order. In *Beynon v Scadden* [1999] IRLR 700 the appeal tribunal had said that its previous decisions n *Wiggin Alloys Ltd v Jenkins* [1981] IRLR 275 and *Omar v Worldwide News Inc* [1998] IRLR 291 could not be taken as introducing any fetters on the broad jurisdiction which rule 12 conferred on employment tribunals and indicated that each case depended on its own circumstances and that it was a matter for the tribunal to decide whether or not to investigate means. Accordingly, there was nothing in the authorities to support the proposition that it was wrong in principle for a tribunal to consider means before deciding the question of reasonableness. The question of means was, in an ordinary case, likely to be capable of a simple answer after a simple investigation, and in many cases, if it was shown by such an investigation that there were no means, the tribunal might well not go on to consider the more difficult question as to whether the person against whom the costs order was sought had acted unreasonably. There was, therefore, good practical sense in looking at the question of means before the question of reasonableness, but it might be equally sensible, in a different case, to look at reasonableness before means, especially if it did not involve much investigation whereas the question of means might involve more investigation. In the present case there was no error of law in the tribunal having looked at means before reasonableness.

Zalzala v Sheffield University; 21 November 2000; EAT/976/99
EAT: Mr Recorder Burke QC, Mr D Norman and Ms H Pitcher

DISABILITY DISCRIMINATION

An employment tribunal found, as a preliminary issue, that, although the applicant suffered from dyslexia, he was able to carry out his normal day-to-day activities and was not disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

JUDGE PUGSLEY, allowing an appeal by the applicant, said that, although the tribunal had correctly directed themselves as to the law, all the examples of day-to-day activities they had quoted were work-elated and they had failed to carry out a widespread and comprehensive review of the definition of day-to-day activities as interpreted in the Guidance Notes. In *Goodwin v Patent Office* [1999] ICR 302 the appeal ribunal had made it clear that tribunals should adopt an investigative role and a purposive approach to the egislation. The tribunal did not appear to have carried out any balanced judgment of the applicant's day-o-day as opposed to work-related activities. The tribunal had defined the issues and set out a preliminary hearing. It would have been more helpful had the tribunal heard the whole case. Other matters might have hrown light on the fundamental question under consideration. Moreover, it would have saved time in the ong run. Where there was an issue as to why the applicant was dismissed, hearing the evidence on that ssue might very well throw light on whether the applicant was to be regarded as disabled and there was likely to be a more penetrating analysis of what had happened. The matter would be remitted and the tribunal invited to consider looking at the overall case rather than dealing with it in discrete parts.

Hutton v A E Proctor Ltd; 18 December 2000; EAT/1319/99
EAT: Judge Pugsley, Mr D J Hodgkins and Mr A D Tuffin

DISABILITY DISCRIMINATION

An employee who suffered from chronic fatigue syndrome was allowed to return to work on a part-time basis by using his annual leave. An employment tribunal found that the loss of leave caused him considerable concern and that his distress was compounded by the employer's failure to provide him with adequate support from other employees. The tribunal held that, for the purposes of section 6(1) of the Disability Discrimination Act 1995, the arrangements made for his return to work placed the employee at a substantial disadvantage in comparison with persons who were not disabled, and they upheld his complaint of discrimination under section 5(2).

LORD JOHNSTON, dismissing an appeal by the employer, said that the employer submitted, on the issue of the reasonableness of particular steps it was said could have been taken, that, if the substantial cause of the employee's stress related to the annual leave problem, the step of acting up cover or job share would have little benefit. The issue before the tribunal was essentially one of fact and they were entitled to hold that a substantial disadvantage had been established by reason of the fact that support had not been given even if the issue of annual leave also contributed to the question of stress. While the employee had been off work the job had been filled and there was no reason for that not to have continued so long as he needed help. It was unreasonable for the employer not to take the relevant steps to provide support, since it obviously had the resources to do so but chose not to use them.

Midlothian Council v Elliot; 28 November 2000; EAT/624/00
EAT (Sc): Lord Johnston, Miss S B Ayre and Ms A E Robertson

EMPLOYMENT TRIBUNAL

At the conclusion of the hearing of an applicant's complaint of unfair dismissal the tribunal's decision to dismiss the complaint was given orally. The applicant's representative then orally requested "written reasons" or "full written reasons". Summary reasons only were given and the applicant's representative subsequently wrote to the tribunal saying that extended reasons had been requested but had not been received. The chairman took the view that there had been no request for extended reasons and he refused to provide them.

LINDSAY J, on an appeal by the applicant against the refusal to give extended reasons, said that, bearing in mind that written reasons albeit in summary form issued in any event under rule 10(3) of the Employment Tribunals Rules of Procedure 1993 and that what were now called extended reasons used to be called "full reasons", one could not describe as unreasonable the applicant's thought that a request for full written reasons or even for written reasons was a request for extended reasons, yet the employment tribunal chairman, not hearing the word "extended", had not unreasonably taken the view that there had been no request for extended reasons. That unfortunate but understandable misunderstanding should not of itself deny any appeal by the applicant. The appeal tribunal could either require extended reasons to be given or exercise its discretion to proceed with the appeal on the summary reasons. Without adequate information as to which course to prefer, the tribunal would take the unusual step of ordering the applicant's appeal to proceed on summary reasons with the chairman being requested to supply his notes of evidence and submissions, if within 14 days of the judgment being sent to the employment tribunal chairman he indicated that it was not now practicable to compose adequate extended reasons. If no such indication was given, the chairman would be directed to supply extended reasons within a further four weeks.

Turtle v Stead & Simpson; 26 October 2000; EAT/854/99
EAT: Lindsay J, Mr D J Hodgkins and Mr D J Jenkins

HOLIDAY PAY

In order to comply with regulations 13(1) and 16(1) of the Working Time Regulations 1998, an employer reduced all employees' hourly rates of pay to make provision for their holiday pay. Complaints by employees that the employer had made unauthorised deductions from wages were dismissed by the employment tribunal.

JUDGE WILCOX, allowing an appeal by the employees, said that the reduction in the hourly rate to fund the holiday pay had not been made with the consent or agreement of the employees. The tribunal had erred in law in concluding that the deductions from the employees' pay discharged the employer's liability under the 1998 Regulations to provide paid holidays. The tribunal had made a fundamental error by holding that under a contract of employment the employer could, without consent, unilaterally reduce entitlement to pay in order to fund holiday pay. Other considerations might arise if there was a consensual arrangement, but that was not the present case. The employer would be ordered to repay the deductions made.

Davies v M J Wyatt (Decorators) Ltd; 13 July 2000; EAT/1262/99
EAT: Judge David Wilcox, Mr D J Jenkins and Mr K M Young

MISCONDUCT

An employment tribunal found an employee to have been unfairly dismissed for using the telephone for personal calls in breach of policy when over the period of a year she appeared to have made two or three calls a week for about seven minutes each, the total cost being estimated at £37.76. The employer was found not to have followed a fair disciplinary procedure in dismissing her where, inter alia, she was summarily interviewed without warning and a disciplinary process was instigated minutes after the interview, dismissal following thereafter. The employee had over 13 years' service and no disciplinary matters on file.

BELL J, dismissing the employer's appeal, said that *Royal Society for the Protection of Birds v Croucher* [1984] ICR 604, a case of admitted serious dishonesty by a director, was authority for the proposition that there might be cases of admitted dishonesty in which it was not incumbent on the employer to give the employee a warning or carry out a detailed investigation before deciding that the employee should be dismissed. The employer contended that the employee's conduct was clearly dishonest, that there was no need for any warning or investigation and it was entitled to dismiss her on the basis of conduct which she admitted. That contention highlighted the error made by the employer in its original consideration of the employee's case. The employer equated the use of the phone for any personal reason with dishonesty, but the test of dishonesty was not simply objective. The best working test of what was dishonest was that propounded in *R v Ghosh* [1982] QB 1053, 1054 and involved a two-stage process: first, to decide whether according to ordinary standards of reasonable and honest people what was done was dishonest; secondly, if so, to decide whether the person concerned must have realised that what she was doing was by those standards dishonest. It was not necessarily obvious that using the employer's telephone for personal calls was dishonest. The employer did not investigate the question of dishonesty. It put the conduct into the same category, in effect, as stealing money. One could argue that a reasonable employer would be entitled to regard what the employee admittedly did as dishonest, but even so it did not mean that the employer necessarily had to dismiss her. In all the circumstances the duty on the employer to act fairly and reasonably required that it should investigate the seriousness of the offence in the particular case. However, nothing the appeal tribunal had said was meant to indicate that an employee who used the employer's telephone for personal calls was immune from properly conducted disciplinary action which might result in dismissal.

John Lewis plc v Coyne; 7 December 2000; EAT/581/99
EAT: Bell J, Mr G H Wright and Mr K M Young

TIME LIMIT

An employment tribunal awarded an applicant damages for breach of contract on a complaint which had been made after the expiry of the three-month time limit prescribed by article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 without considering whether it had not been reasonably practicable to present the complaint in time and to extend time.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that the employer had not at any stage of the proceedings below resisted the claim on the ground that it was out of time and the applicant submitted that there were no exceptional circumstances to permit the point to be raised for the first time on appeal. The employment tribunal, however, had acted outside its jurisdiction and that was one of the exceptional cases where the appeal tribunal would intervene to correct a plain, though unwitting, illegality on the part of the tribunal. The general rule that the appeal tribunal would not normally allow a decision to be challenged on grounds not argued below was well established, but so was the exception where the fact of the tribunal having strayed outside its jurisdiction appeared beyond doubt without any question of a further factual inquiry being needed. The employment tribunal's award of contractual damages would be set aside.

J F Knight (Roadworks) Ltd v Platfoot; 15 January 2001; EAT/550/99
EAT: Mr Commissioner Howell QC, Mr P Dawson and Mr P A L Parker

COMPENSATION

An employment tribunal upheld an employee's claim of unfair dismissal but in calculating his compensatory award restricted his compensation for loss of earnings to a period of 12 weeks from his dismissal on the ground that they were not satisfied that he had taken sufficient steps to find alternative employment at a time when he was in receipt of job seeker's allowance.

JUDGE PETER CLARK, allowing an appeal by the employee, said that the employee argued, first, that since he was in receipt of job seeker's allowance throughout the period between dismissal and the employment tribunal hearing and since it was the requirement of receiving that benefit that the claimant had taken all reasonable steps to obtain employment, he could not be said to have failed to mitigate his loss under section 123(4) of the Employment Rights Act 1996. That proposition could not be accepted as a matter of law. The question whether a claimant had satisfied the requirements of entitlement to job seeker's allowance according to the relevant government department was a relevant factor, but could not answer conclusively the judicial question as to whether or not he had mitigated his loss for the purposes of section 123(4). However, the employee took a second point, namely that in their reasons for their substantive decision the employment tribunal observed, correctly, that the burden of proving loss lay on the employee, but went on to assume that he also bore the burden of showing that he had taken reasonable steps to mitigate the loss. He did not. Although in *Scottish & Newcastle Breweries plc v Halliday* [1986] ICR 577 a division of the Employment Appeal Tribunal held that the onus lay on the applicant to establish that he had taken reasonable steps to mitigate his loss, that approach had been disapproved by later divisions in *Morganite Electrical Carbon Ltd v Donne* [1988] ICR 18 and *Fyfe v Scientific Furnishings Ltd* [1989] ICR 648. The appeal tribunal was satisfied that the later divisions were correct on that point, following as they did the earlier Court of Appeal decision in *Bessenden Properties Ltd v Corness (Note)* [1977] ICR 821. It seemed clear that the employment tribunal had incorrectly placed the burden of proof on the employee to show that he had taken reasonable steps to mitigate his loss. Accordingly, the finding as to mitigation could not stand and the appropriate course was to remit the matter to the same tribunal to reconsider that question. It would be open to both parties to adduce further evidence, including documents which the employee had subsequently been refused permission to put before the employment tribunal.

Henderson v Northern Leisure plc; 17 January 2001; EAT/70/00
EAT: Judge Peter Clark, Lord Davies of Coity and Mr J C Shrigley

DISABILITY DISCRIMINATION

An employment tribunal upheld a complaint by an applicant of disability discrimination in relation to his dismissal on the ground that his employers had not shown that they had made reasonable adjustments to compensate for his disability in accordance with section 6(1) of the Disability Discrimination Act 1995 in that no real effort had been made to find alternative work for him after he became unable to continue to work as a process operator at an oil refinery.

JUDGE COLLINS, dismissing an appeal by the employers, said that underlying the whole of the tribunal's reasoning was a view that the employers did not really wish to keep the applicant in their employment. The essence of the employers' appeal was that the tribunal had not identified in their reasons any specific step under section 6 which the employers were under a duty to take in order to prevent the arrangements made by them from placing the applicant at a substantial disadvantage. It was correct that the tribunal had not identified any particular step. There was no material on which the tribunal were able to conclude that there was suitable employment available or that some suitable alternative employment would have become available in the reasonably foreseeable future. Without laying down any general rule as to what the burden of proof was in relation to potential adjustments under section 6, where, as in the present case, the potential for alternative employment lay for practical purposes exclusively within the knowledge of the employer, there was a burden of proof on the employer to satisfy the tribunal that there was no alternative employment either available or available in the reasonably acceptable future for the employee. Accordingly, the employment tribunal were entitled to reach the conclusion they did on the ground that the employers had not discharged the burden of proof on them.

Conoco Ltd v Booth; 30 January 2001; EAT/83/00
EAT: Judge Collins, Lord Davies of Coity and Mr P A L Parker

DISABILITY DISCRIMINATION

On complaints by an employee of unfair dismissal and disability discrimination, an employment tribunal held that he had been unfairly dismissed and awarded compensation subject to a contribution in respect of his own fault of 50%. The tribunal also upheld his disability discrimination complaint in respect of the failure by the employers to make adequate adjustments and made a substantial order for compensation, but without any deduction in respect of contribution, saying that, had the employers given the employee the kind of assistance they were under a duty to provide, there was a strong probability that the lapses on his part that had led to his dismissal in August 1997 would have been avoided.

LORD JOHNSTON, allowing an appeal by the employers, said that the tribunal had proceeded on a wholly false basis with regard to the applicability of the Disability Discrimination Act 1995 to events between June and December 1996, being unaware that the relevant sections did not come into effect until December 1996. Given that situation, their decision could not stand in relation to disability discrimination; nor in relation to unfair dismissal, by reason of the fact that the finding on fairness was substantially based on the existence of discrimination prior to December 1996. Further, the tribunal's approach to contribution in relation to the discrimination aspects was flawed, given a finding of 50% contribution by the employee in relation to the unfair dismissal. The appeal tribunal would not suggest that, in some cases, a finding of contributory fault in relation to a successful claim for unfair dismissal would necessarily bear on a quite separate claim for discrimination, whether on race or disability grounds, at the instance of the same employee in respect of the same employment. However, where the two were inextricably bound up, as in the present case, inasmuch that it was the employee's conduct that led to the dismissal but it was said that the employers' failure to look after his interests in relation to the Act rendered the dismissal unfair, logic dictated that if there was to be a 50% contribution in relation to unfair dismissal the same must apply in respect of the discrimination, having regard to the fact that under section 8(3) of the 1995 Act compensation was to be assessed as a claim for reparation at common law where contributory negligence or fault, if applicable, was a highly relevant element. As the decision was fundamentally flawed by reason of the false premise on which it had proceeded, the matter would be remitted for a fresh hearing before a different tribunal.

Fife Council v McPhee; 27 February 2001; EAT/750/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Miss A Martin

REMEDY

An employment tribunal upheld a claim by an employee that he had been discriminated against by way of victimisation within the meaning of section 2 of the Race Relations Act 1976 when he was not appointed to one of the vacant posts of tenancy services officer in January 1998 and awarded compensation of £10,221 based on the difference in salary for the period January 1998 to May 1999, when the employee turned down the employers' offer of a tenancy services officer post.

LINDSAY J, allowing in part an appeal by the employee against the remedies decision, said that under regulations 2 and 7 of the Employment Tribunals (Awards in Discrimination Cases) Regulations 1996 there was a duty on the employment tribunal to consider whether to include interest on compensation awarded, even if neither party addressed the tribunal in relation to interest. In the present case, the tribunal's reasons showed no consideration being given to the subject of interest. That was an error of law. The second ground of appeal related to the tribunal's decision that "The employee did not seek a recommendation under section 56(1)(c) of the 1976 Act. None therefore is made." The question was whether it was an error of law for a tribunal which could be seen to have had that provision in mind not to make a recommendation because none was sought. The answer could only be that it depended on the circumstances of the case. The action to be recommended must appear to the employment tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of the act of discrimination. The adverse effect the amelioration of which was to be the practicable purpose of the recommendation was not some nebulous or general adversity but the adverse effect on the complainant of the very act of discrimination complained of and held to be well-founded. The recommended action must be such that the tribunal could be expected to be able to specify a period within which it was to be taken and it must be capable of being specified with reasonable clarity. Careful consideration needed to be given to whether an apparently obvious step to be recommended would not itself be potentially discriminatory against others. Moreover, detailed information as to the circumstances of the job and practices of the workplace would often be required. Still less, in such cases, would it be reasonable that the tribunal should be expected to specify a recommendation without receiving argument and assistance from the parties. Thus, it could not be said that it was invariably an error of law for a tribunal which had the provision in mind not to make a recommendation because none was sought, and the tribunal had not so erred in the circumstances of the present case.

Fasuyi v Greenwich London Borough Council; 20 October 2000; EAT/1078/99
EAT: Lindsay J, Mr P Dawson and Mr B M Warman

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint of unfair constructive dismissal, holding that the employer had acted reasonably in demoting the employee for poor time-keeping, that there was no fundamental breach of his contract of employment and that the dismissal was within the band of reasonable responses of a reasonable employer.

LORD JOHNSTON, dismissing an appeal by the employee, said that the tribunal's reasoning confused issues of constructive dismissal which depended on an assessment of whether or not the employer was in material breach of the contract of employment with issues of fairness which arose when an employer effected a dismissal on one of the reasons acceptable under section 98 of the Employment Rights Act 1996. By definition, if constructive dismissal was achieved by reason of the employer having acted in such a way as to indicate for one reason or another that he was repudiating the contract of employment, whether by breach of an express term or by general conduct so outrageous that the employee was not bound to put up with it, the issue of fairness did not arise, because once a fundamental or material breach of contract had been established it could not be defended on grounds of fairness. It was inappropriate to introduce an issue of reasonableness into the issue of constructive dismissal beyond an assessment of the employer's conduct within the context of the contract of employment. There could not be an assessment of a band of reasonable response in relation to the employer's conduct in constructive dismissal because the employer had not effected such a dismissal. For that test to apply, there must have been a dismissal actually effected by the employer. However, on the facts, the appeal tribunal were quite unable to hold that the employer was in material, let alone fundamental, breach of contract when he demoted the employee for poor time-keeping. The way the employee had been performing his contract appeared to be in breach of the contract and that precluded him from relying on the contract in seeking constructive dismissal, since the trigger of the whole matter was his own conduct.

Johnstone v W Wilson & Sons; 27 February 2001; EAT/953/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Miss A Martin

BIAS

When the hearing of an applicant's complaints of unfair dismissal, race and sex discrimination resumed six months after having being adjourned part heard, the applicant was too unwell to attend and her representative, who was black, sought a postponement which was twice refused. He made a third request adding that if he had been an Oxford educated white barrister he would not be so treated. The employment tribunal terminated the proceedings on the ground that they could not fairly determine the applicant's complaints in the light of that accusation of racism. A fresh tribunal ordered the complaints to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the applicant's representative had been scandalous.

JUDGE PETER CLARK, allowing an appeal by the applicant and a cross-appeal by the respondent against the first decision and dismissing the applicant's appeal against the second decision, said that the first question was whether the first tribunal had been entitled to discontinue the proceedings without notice to the parties. It was common ground that a tribunal had power to order the discontinuance of proceedings and direct a case to be heard by a different tribunal by a combination of its powers under rules 13(1) and 16 of the 1993 Rules, but it was a power to be used sparingly and only for good reason, and the first tribunal had been wrong to order discontinuance. First, it was already an old case. Secondly, the tribunal were 12 days into a hearing anticipated to take 18 days. Thirdly, the context was important. The tribunal had retired to consider the representative's third application for an adjournment on the ground of the applicant's inability to attend due to illness. When they returned, without canvassing the views of either representative, and in the absence of the applicant, they simply declared that they felt unable to continue. It was the duty of any judicial body to approach its task with impartiality and equanimity, not to abdicate its responsibility. Where its authority was challenged, it had to deal with that challenge itself. The proper course would have been to require the applicant's representative to affirm or withdraw his accusations. If he had continued to press his claim of racial bias, it would then be for the tribunal, either of its own motion, or on the basis of an application by the respondent after discontinuance had been ordered, to consider a strike out under rule 13(2)(e). Alternatively, if he withdrew his remarks it would have been open to continue the hearing with or without an adjournment. Given the nature of the representative's remarks, set against the background, the proper course for the tribunal would have been to adjourn the case, giving the applicant notice of the possibility of a strike out and an opportunity to be heard on that. The next question was whether the appeal tribunal should strike out the complaints. The representative, in making an unwarranted charge of racial bias, was attempting to interfere with the due administration of justice and effectively succeeded. His conduct was scandalous, as the second tribunal found, and, coming on top of his repeated applications for an adjournment, was also vexatious. Ought the applicant to be fixed with her representative's conduct in her absence? She plainly gave him express instructions to persist in his applications for an adjournment. So far as his remarks were concerned, it was sufficient that a party had instructed the representative to conduct the case on her behalf, but also the applicant had in an affidavit wholeheartedly endorsed his remarks. The complaints would be struck out, and, the applicant having acted unreasonably in conducting the proceedings within the meaning of rule 12(1) and given her means to the second tribunal, the costs order of one day's costs made by that tribunal in favour of the respondent would be upheld.

Bennett v Southwark London Borough Council; 26 January 2001; EAT/1273/97
EAT: Judge Peter Clark, Mr K Edmondson and Mr D J Hodgkins

EMPLOYMENT TRIBUNAL

A respondent employer attended a hearing at an employment tribunal without witnesses or legal representation believing it would be a hearing for directions. A tribunal chairman, sitting alone, refused to adjourn the proceedings and proceeded to hear and determine the employee's claim for payment of salary and bonus following the termination of his employment, which involved determination of disputed issues of fact as to whether the employee had been in breach of his contract.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that it was apparent that the case required the resolution of substantial disputes as to issues of fact and an assessment of the credibility of individual witnesses. If a chairman did not exercise his discretion, on reasonable grounds, under section 4(5) of the Employment Tribunals Act 1996 in favour of sitting alone, a case had to be heard by an employment tribunal fully and properly constituted under section 4(1). On the material before the appeal tribunal, the required consideration under section 4(5) never took place in the present case. The consequence was that there had been a clear error of law, and it was not necessary to consider whether the proceedings before the chairman were a nullity or only an irregularity. Further, the only reasonable conclusion to which a chairman could have come, in addressing the issue under section 4(5), was that the case was one which required to be dealt with by a full employment tribunal. Accordingly, the employment tribunal decision would be set aside and the case remitted to a full tribunal.

Professional Selection & Development Ltd v Wahab; 26 October 2000; EAT/64/00
EAT: Mr Commissioner Howell QC, Mr I Ezekiel and Lord Gladwin of Clee

REDUNDANCY

An employer undertook a redundancy selection process using an established standard assessment procedure based on factors relating to performance, length of service, etc, each marked on a points system and then given different weightings. An employee was told that he had been provisionally selected for redundancy and a brief discussion took place. There was no further discussion until four days later when he was told that there were no suitable alternative positions and that he could appeal under the grievance procedure. An employment tribunal, by a majority, upheld his complaint of unfair dismissal on the grounds that the selection procedure was flawed and that the opportunity for consultation had been inadequate.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that the issues of fairness and reasonableness in relation to the employee's dismissal needed to be judged by the test of the "range of reasonable conduct" for a reasonable employer in the circumstances facing the employer at the time. Only if the selection system itself, or the way it was applied in the employee's individual case, fell outside that range could his dismissal for redundancy properly be characterised as unfair. The detailed reasoning of the majority of the employment tribunal indicated that they were addressing some question other than the range of what might have been done by a reasonable employer. Even if not overtly intending to substitute their own view as to how they would themselves have acted, they had fallen into the error against which tribunals were enjoined by *British Aerospace plc v Green* [1995] ICR 1006, 1009–1010, of allowing themselves to get involved in an over-detailed exercise of picking away at individual aspects of the standard selection system used by the employer and of its application in the particular case: even down to making criticisms of individual markings awarded. Moreover, the criticisms were not even well-founded and could not reasonably support a conclusion that the system and its application fell outside the range of fairness and reason. Specifically, there was nothing in the broadly defined performance categories or the weightings that could be said to make them by nature inappropriate for office employees. It was inherent in the nature of the exercise that the criteria must be capable of being applied uniformly across a broad range of employees, and that inevitably meant that they would be expressed in general and not individually tailored terms. The majority had misdirected themselves as to the test of fairness, and it necessarily followed that their decision could also not stand on the alternative ground of their secondary conclusion of procedural unfairness because of inadequate consultation. The case would be remitted for redetermination of all issues. But the previous tribunal's unanimous findings of fact might properly be taken as the practical starting point. Also, it was the view of the appeal tribunal that, while the adequacy of consultation was a matter of fact and degree for the tribunal to determine, it fell short of an adequate and reasonable standard of consultation for an employee to be told on Monday that he was to be selected for redundancy dismissal to take place on Friday and effectively left with the burden of instituting "grievance" procedures if he wished further consideration to be given to him. Reasonable consultation must involve a joint approach to what should be viewed as a mutual problem. If consultation was not to be futile it had to acknowledge at least the possibility of realistic alternatives and allow them to be properly explored.

Chronos Richardson Ltd v Watson; 27 March 2001; EAT/1340/99
EAT: Mr Commissioner Howell QC, Mr B V Fitzgerald and Mr H Singh

TRANSFER OF UNDERTAKING

Seven of the employees of a specialist scaffolding company worked exclusively at a power station where the company had a contract to provide scaffolding services. When the contract expired a contract for scaffolding, together with other services, was granted to another company, who did not take on any of the employees, using scaffolders from their own pool of labour. Meanwhile, the employer's contract was extended for 12 weeks to clear its scaffolding from the site. The employees brought complaints of unfair dismissal and entitlement to redundancy payments against both companies in the alternative, and their union brought a complaint against the first company alleging a lack of consultation contrary to regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The employment tribunal concluded, as a preliminary issue, that there had been no transfer of an undertaking for the purposes of the 1981 Regulations.

JUDGE PETER CLARK, dismissing appeals by the employees and the union, said that it was submitted that the employment tribunal had been wrong to find that the two contracts were fundamentally different. That was a permissible finding with which the appeal tribunal could not interfere. Nevertheless, it was argued, it was in any event an irrelevant factor: merely because the service provided by the employer had been subsumed into a wider contract entered into by the second company was nothing to the point. The appeal tribunal disagreed: it was a relevant, though not conclusive, factor in determining whether the former economic entity operated by the employer was transferred to the second company if the service formerly provided differed materially from that provided by the incoming contractor. It was then submitted that the employment tribunal had elevated the factor into one determinative of the transfer question, and *Farmer v Danzas* (unreported) 6 October 1994 was relied on. But the facts of that case were far removed from those of the present case and no assistance was gained from the, plainly correct, observation by Morison J: "There is nothing in any European decision to suggest that an economic entity ceases to retain its identity merely because the economic activity is subsumed into the transferee's business." The employment tribunal in the present case did not appear to have isolated the factor as being determinative of the transfer question, as opposed to the employment tribunal in *Farmer* deciding that case on a single factor, all other factors pointing to a transfer, itself an impermissible consideration, so as to arrive at the opposite conclusion. Equally the appeal tribunal was satisfied that the continuation of the employer's contract had not been treated by the employment tribunal as being itself determinative. As to its relevance, it was submitted that there would often be cases in which the takeover by one contractor would take place over a period of time, and that there was a difference between the employer's original contract and the further contract, described by the tribunal as an extension, to remove the scaffolding. That, however, confused the contract with the economic entity, which consisted of scaffolding work involving a dedicated workforce using the employer's scaffolding equipment at the power station. The fact was that that part of the employer's undertaking continued while the second company was also on the site providing scaffolding services using its own men and equipment. In those circumstances it could not be said that the continuation of work by the employer was irrelevant to the overall question of whether the economic entity operated by the employer was transferred to the other company, retaining its own identity.

AEEU v Lyndon Scaffolding plc; 26 January 2001; EAT/1242/99
EAT: Judge Peter Clark, Mr W Morris and Mr J C Shrigley

WAGES

Employers reduced a sum of 70p per hour previously paid to an employee as an attendance bonus to 30p, removing some of the conditions attaching to it, and increased his basic hourly pay rate from £3.27 to £3.67 so that it complied with the national minimum wage. An employment tribunal dismissed a complaint by the employee that the employers were in breach of section 1(1) of the National Minimum Wage Act 1998 and regulation 11 of the National Minimum Wage Regulations 1999 or that they had made unlawful deductions from his wages contrary to section 13(1) of the Employment Rights Act 1996.

LORD JOHNSTON, allowing an appeal by the employee, said that regulation 31(1)(d) of the 1999 Regulations provided that allowances other than those attributable to the performance of the worker had to be left out of account in calculating remuneration in terms of section 1 of the 1998 Act. However, for the purposes of section 13 of the 1996 Act all such allowances could be taken into account in calculating wages. What then had to be considered in the present case was whether it was appropriate to look at the overall package in terms of ultimate take home pay or at the effect the new package had had on allowances. The appeal tribunal preferred the latter approach, since there was no doubt that under the new arrangement the attendance allowance, even when the conditions were varied, had in fact been reduced. That arrangement, whereby part of the attendance allowance was removed to supplement the rate of pay up to the appropriate level, could not be distinguished from the exercise carried out in *Davies v M J Wyatt (Decorators) Ltd* (unreported) 13 July 2000 [see Recent Points [2001] ICR Part 3], where it was held that to fund holiday pay by removing sums from the basic wage package was unlawful. Following that case, the appeal tribunal would hold that in the present case the effect of the arrangement was to create an unlawful deduction of wages. The matter would be remitted to consider the issue of whether there had been any consent to the variation by the employee.

Laird v A K Stoddart Ltd; 23 January 2001; EAT/834/00
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

COMPENSATION

An employment tribunal deducted a global amount of 50% from an award of compensation for unfai dismissal in respect of (i) an assessment of the chances of the applicant being kept in employment, had a fai investigation been carried out into the conduct for which he was dismissed, and (ii) the extent to which his conduct had contributed to his dismissal.

LORD JOHNSTON, allowing an appeal by the employers, said that the employers' argument was that although the tribunal had identified two issues that it required to address, it had then intermingled them and reached a unitary conclusion which did not separate out those two issues which could be classified respectively, as an assessment of whether or not, with a proper investigation, dismissal would still have followed (the *Polkey* approach) and, separately, the extent to which the applicant's conduct contributed to his dismissal. Reference was made to *Rao v Civil Aviation Authority* [1994] ICR 495, 501G in which Sir Thomas Bingham MR identified the two separate issues and declared that the *Polkey* type situation required to be considered and an assessment in percentage terms made before a tribunal went on to consider the question of contribution by way of conduct. The employers' approach was correct inasmuch that the tribunal was required first to consider the extent to which a *Polkey* type deduction should be made and only thereafter to go on to consider what percentage of the remaining figure should be subject to deduction again by reason of contribution. The appeal tribunal was unable to determine what was in the mind of the employment tribunal as a percentage to be deducted in relation to *Polkey*, and that was important because it was the net figure from any such deduction which required to be the base for any contribution. By way of example, if the view of the employment tribunal was that the *Polkey* deduction should be 50% and the applicant's conduct should be assessed at 50%, then the award should have been 50% of 50% and not 50% simpliciter. The matter would be remitted for clarification and assessment of the *Polkey* deduction and, separately, the issue of contribution.

Baillie v McFarlane; 2 May 2001; EAT/1403/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Dr W M Speirs

FRUSTRATION

An employee who was unable to work as a result of suffering injuries to his hand at work remained "on the books" of the company by which he was employed, though he received no pay, apart from £10 of vouchers at Christmas, and was in receipt of various benefits. When the company went into receivership three years later he was sent forms relating to redundancy payments, but his claim for a payment was rejected by the Secretary of State for Trade and Industry. An employment tribunal dismissed his complaint for a redundancy payment on the ground that his contract of employment had been frustrated when he was injured.

JUDGE PUGSLEY, dismissing an appeal by the employee, said that the doctrine of frustration did apply to contracts of employment and had been correctly defined by the employment tribunal as occurring when an event made the contract impossible or unlawful to perform or radically different from what the parties originally intended. When such a contract was frustrated it came to an end without a dismissal by the employer or a resignation by the employee. It was argued on appeal that the employment tribunal had given insufficient weight to the fact that a contract of employment was a voluntary relationship between parties and it was a contradiction in terms that, although both parties regarded the employment as continuing, it had in fact terminated. It was said that the doctrine of frustration did not permit a court to impose on the parties a termination of the contract against their will. Counsel sought to distinguish *Sharp v McMillan* [1998] IRLR 632 on the ground that in that case both parties recognised there was no prospect of the employee returning to work and it was agreed he be kept on the books to qualify for a more generous pension. It was submitted in the present case that a distinguishing factor was that the parties acknowledged the contract had come to an end and entered into a different arrangement. But in *Sharp* Lord Johnston said, at para 20: "if a contract is frustrated by operation of law, there is nothing to revive and a nullity has to be declared. There is nothing to prevent parties entering into a new arrangement but they must do so with the clear intention to achieve that result . . . If the parties both think . . . the previous contract is still subsisting, there is no intention to create a new contract . . ." In the present case the employment tribunal had found as a fact that, contrary to what the employee contended, he had no real intention of going back to work and there was no prospect of his doing so. Given that finding, it could not be said that the tribunal had erred in concluding that frustration of the contract had taken place. The contract no longer subsisted and, therefore, the employee was not eligible for redundancy pay.

Collins v Secretary of State for Trade and Industry; 31 January 2001; EAT/1460/99
EAT: Judge Pugsley, Mrs J M Matthias and Mr D Norman

ROTECTED ACT

An employment tribunal held that it had no jurisdiction to hear an applicant's complaint, pursuant to ection 103A of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998), hat he had been unfairly dismissed in September 2000 because of a protected disclosure he had made in Iovember 1993, on the ground that the disclosure relied on had taken place before section 103A came into ffect in July 1999.

LORD JOHNSTON, allowing an appeal by the applicant, said that the preliminary issue to be etermined was whether the protection now afforded by section 103A of the 1996 Act could apply in elation to a disclosure which took place prior to the coming into force of that section. It was not disputed hat what the applicant was said to have done in 1993 by reporting his employers to the Inland Revenue mounted to a protected disclosure. It appeared that the question at issue was novel, not only in relation to rotected disclosure, but generally in relation to protected conduct, and, indeed, in relation to unfair ismissal generally. In the opinion of the appeal tribunal, the section was not properly to be regarded as aving any retrospective effect in relation to the present case, because the crucial aspect was the fact that he dismissal was effected after it came into force. It was that act of the employers that required the pplicant to claim a protected disclosure. It was a voluntary act on the part of the employers and it was ot, therefore, appropriate to regard the legislation as having taken away any rights available to them. The isclosure having been made in 1993 acquired the status of a protected disclosure when it became relevant o an issue of dismissal subsequent to 1998. There was nothing inconsistent or unfair in that approach and, ndeed, it would be very surprising if, in relation to unfair dismissal cases generally, going back to when the egislation was first implemented, it would be incompetent for either an employer or an employee to refer o conduct predating the coming into effect of the legislation. If the issue was to be balanced as one of airness, it would be manifestly unfair that the applicant should be denied the right to claim a protected isclosure if it was relevant to a dismissal effected after 1999 notwithstanding that the actual act of isclosure might have been many years before.

Miklaszewicz v Stolt Offshore Ltd; 2 May 2001; EAT/1385/00
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

IME LIMIT

An employment tribunal dismissed an employee's complaint of unfair dismissal, made some two years fter the effective date of termination of his employment, on the ground that it was not satisfied that it had ot been reasonably practicable for the complaint to have been presented in time under section 111 of the mployment Rights Act 1996.

BELL J, dismissing an appeal by the employee, said that the essence of the employee's case was that he ad been unable to make his application earlier than he had because of continued mental ill-health ollowing a breakdown due to his work conditions. It was argued, first, that the employment tribunal had rred in making a distinction between presenting, or setting in motion, a claim on the one hand and rosecuting, and thus proceeding with, it on the other, so far as the first stage of the test for ection 111(2)(b) was concerned. Moreover, it was argued, it would be unjust if an application by omeone who was mentally ill was "presented" for the purposes of section 111(2) by the mere act of getting to the office of the employment tribunal, because he might be met by an application challenging his ntitlement to bring proceedings or an application to strike out for want of prosecution. But the rosecution of a claim was a very different exercise to its presentation as described in rule 1(1) of the mployment Tribunals Rules of Procedure 1993, and it made obvious sense both that an application hould be promptly presented in that sense and that presentation in that sense was all that was required to eet the requirements of section 111(2). It was sufficient if the Form IT1 stated the nature of the claim uite simply. It made no sense to suggest that "presented" was meant in its simple sense, as it clearly was, or the purpose of meeting the time limit in section 111(2)(a) but meant "presented and prosecuted" for the urposes of what was reasonably practicable, or indeed, reasonable, when applying paragraph (b).

Turner v Havering London Borough Council; 4 December 2000; EAT/1066/99
EAT: Bell J, Lord Davies of Coity and Mrs D M Palmer

[2001] ICR Part 7

COMPENSATION

When awarding compensation for unfair dismissal an employment tribunal, inter alia, reduced th compensatory award by 50% on the ground that it was just and equitable to do so to reflect the extent t which the applicant’s actions contributed towards his dismissal “bearing in mind a range of factor including the employer’s [conduct]”.

LINDSAY J, allowing an appeal by the employer, said that it was argued by the employer that th tribunal had misapplied section 123(6) of the Employment Rights Act 1996 in that it had had regard to th employer’s conduct as well as the applicant’s conduct rather than limiting its inquiry to the applicant’ conduct. The cases showed that in considering section 123(6) the tribunal was limited to looking at th extent to which the dismissal had been caused or contributed to by any action of the applicant. It wa inescapable that the tribunal had erred in law in looking outside that to which section 123(6) limited it The extraneous matter taken into account could only have served to reduce the amount of the reduction, a if to reflect some wrong on the employer’s part. That error alone justified setting aside the compensatory award.

London Underground Ltd v Shah; 27 February 2001; EAT/0140/00
EAT: Lindsay J, Lord Davies of Coity and Mrs R A Vickers

CONSTRUCTIVE DISMISSAL

An employee resigned following his employer’s decision that he could no longer deal with cash transactions because he was suspected of dishonesty. An employment tribunal rejected his complaint of unfair dismissal, holding that he had not been constructively dismissed because the employer had not fundamentally changed his job and so had not repudiated his contract of employment.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employee, said that the employee’s job description had never formally been reduced to writing. In such circumstances the only material available to identify what he was obliged to do for his employer was the way in which the contract had been performed. With the guidance of Lord Hoffmann in *Carmichael v National Power plc* [1999] ICR 1226, 1234, it was open to the employment tribunal to find that the employee’s employment was as a builders’ merchants yard operative. The tribunal found that his “principal job” was “serving customers”. The “new” duties proposed by the employer did not relate at all to dealing with customers. Requiring an employee to cease doing what had been his principal job and to take up a new role, in circumstances in which there had been no allegation of dishonesty, would amount to a variation of the employee’s contract. Such a variation could not be imposed without the employee’s consent. To do so would almost always be capable of being a repudiatory breach. Whether it reached the materiality sufficient for the breach to be repudiatory had to be judged objectively by reference to its impact on the employee. Once the breach was of sufficient materiality to be regarded as repudiatory, the underlying motive became irrelevant. The presence of an allegation of dishonesty thus made no difference. On the facts recorded by the tribunal, it would be difficult to come to the conclusion that there had been no fundamental change in the employee’s job. It was not possible to tell how the employment tribunal had reached such a conclusion. The appeal would be allowed and the matter remitted for rehearing, when the issue was likely to be whether the constructive dismissal was unfair.

Hilton v Shiner Ltd; 24 May 2001; EAT/9/00
EAT: Mr Recorder Langstaff QC, Ms B Switzer and Miss S M Wilson

DISABILITY DISCRIMINATION

An employee who suffered from depression was dismissed because she had been absent from work for over a year on medical grounds. An employment tribunal dismissed her complaint of disability discrimination, finding that there was no evidence that the employers would have treated differently anyone else who had been absent for a year, and, after hearing evidence from the employee and her doctor, that no reasonable adjustments could have been made.

LINDSAY J, allowing an appeal by the applicant, said that one possible error of law by the employment tribunal was that, in deciding whether the employee was disabled, they had not looked at the correct point of time at which disability needed to be adjudged. The appropriate time was the date of the unfavourable treatment alleged. But there was no cross-appeal on that point. More significantly, it was plain that, despite their reference to *Clark v Novacold Ltd* [1999] ICR 951, the tribunal had taken the required comparison, under section 5(1)(a) of the Disability Discrimination Act 1995, to be between the treatment of the disabled person and the treatment of anyone else who had been absent for a year. That was not the correct comparison. The correct approach was to ask, first: what was the reason for the employee being smissed? The reason was her long absence from work and that she was unable to predict when, if ever, e medical prognosis would be such as to enable her to return. The second question was: was that reason ne which related to her disability? Answer: "Yes". The third question was: would the employers have smissed some other person to whom that reason would not apply? Answer: "No"; there would have been o reason to do so—it was not, for example, as if there had been shown to be a redundancy situation. The nployment tribunal had erred in looking only to whether some other person absent from work for a year ould equally have been dismissed. It was not clear whether the employment tribunal were of the view at the employers were under any section 6 duty to make adjustments, stating that neither the employee or her general practitioner could think of anything that would have represented a satisfactory adjustment. ut the duty to make adjustments under section 6 was on the employers, and the employers had not onsidered any adjustments, as it had been their view that the employee was not suffering from any sability. There would, no doubt, be cases where the applicant's evidence alone would establish a total navailability of reasonable and effective adjustments, but it did not follow that, because the applicant, ng absent from work and clinically depressed, and her general practitioner, who was unlikely to know hat office or other practicabilities were open to the employers, could postulate no useful adjustment, the ction 6 duty on the employers should, without more, be taken to have been satisfied.

Cosgrove v Caesar & Howie; 6 June 2001; EAT/1432/00
EAT(Sc): Lindsay J, Dr A H Bridge and Mr R P Thomson

ACE DISCRIMINATION

An employment tribunal upheld an applicant's claim of racial discrimination contrary to section 4(2)(c) f the Race Relations Act 1976 against both the first respondent, who had dismissed him, and the second spondent, which had acquired the business of the first respondent, holding that the former had been ting as agent for the latter for the purposes of section 32(2) of the Act.

MR COMMISSIONER HOWELL QC, allowing an appeal by the second respondent, said that no round had been demonstrated for challenging the relevant factual conclusions of the employment ibunal: in particular that the applicant's dismissal by the first respondent was an act of unlawful iscrimination carried out by the management of that company but with the encouragement and at the stigation of the second respondent. The question was whether those facts gave rise to any liability on the art of the second respondent itself under the 1976 Act. Acts which were made unlawful only by section 31 f the Act (inducing, or attempting to induce, another person to do any act which contravened Part II or III) ere outside the jurisdiction of employment tribunals. Conduct consisting only of encouragement or stigation might not therefore give rise to a claim in an employment tribunal against the person sponsible, even though done to induce an unlawful act against a person in employment. An unlawful act or which a claim might be brought against the inducer had to be identified: either one unlawful by virtue of art II of the Act itself, so that the tribunal had jurisdiction under section 54(1)(a), or one made unlawful nder section 32 or 33, by treating the inducer as having committed an act of discrimination contrary to art II against the complainant, so that the tribunal had jurisdiction under section 54(1)(b). The acts of scrimination made unlawful under Part II were, so far as relevant, defined in section 4, in each case mited to acts by a person "in relation to employment by him". The structure of section 32 was simply to tribute the authorised acts of an agent to his principal for the purpose of other provisions of the Act. It d not provide any separate way in which those acts were made or treated as unlawful, under Part II or ction 32 itself. The act found by the tribunal to have been done by the first respondent at the second spondent's instigation was the dismissal of the applicant. However, that dismissal was from the nployment of the first respondent; the applicant had never been an employee of the second respondent nd there could be no finding that he had ever been employed by the first respondent as agent of the second spondent or in any other way than on its own behalf acting as principal. It followed that the applicant's smissal could not amount to an act of unlawful discrimination contrary to section 4(2)(c) on the part of e second respondent, since he was at no time employed by it.

School of Finance & Management (London) Ltd v Perera; 3 May 2001; EAT/542/00
EAT: Mr Commissioner Howell QC, Mr B Fitzgerald and Lord Gladwin of Clee

EX DISCRIMINATION

An employment tribunal dismissed a complaint by a lecturer and course leader that by failing to consult er concerning matters relating to the course while she was on maternity leave the respondent college had scriminated against her on the ground of her sex.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was accepted that to subject woman to a detriment because of her pregnancy was unlawful sex discrimination. It followed that, if the eatment complained of by the applicant amounted to a detriment and was causally connected to her egnancy, her claim succeeded. In *Jerimiah v Ministry of Defence* [1980] ICR 13, 26, Brandon LJ said at "detriment" meant "putting under a disadvantage". The factual question as to whether the applicant as put at a disadvantage might be answered by reference to whether a reasonable employee might or might not take the view that there was a detriment. To constitute a detriment there had to be something serious or important about it. The critical question was whether, on the facts found by the employmen tribunal, the tribunal were entitled to conclude, expressly or implicitly, that the applicant had not suffered a detriment by not being consulted during her maternity absence. The need for consultation and its timing were material factors for the tribunal to consider. The bald assertion by the applicant that no consultation during maternity leave equalled unlawful discrimination without more could not be accepted. The tribunal's findings on the absence of consultation and its effect on a reasonable employee, as opposed to the applicant's subjective view, were permissible; and, absent detriment, the statutory tort was not made out.

Ojinnaka v Sheffield College; 7 March 2001; EAT/0201/00
EAT: Judge Peter Clark, Mr D Chadwick and Mr B Gibbs

STRIKING OUT

An employment tribunal chairman struck out an applicant's claim of race discrimination, in relation to the respondent's decision to strike him off its register of nurses, on the basis that it was frivolous, that it had no chance of success and was an abuse of process.

JUDGE ALTMAN, dismissing an appeal by the applicant, said that the chairman had concluded: "In the absence of any true comparators the applicant raises no prima facie case of race discrimination. His claim is frivolous in that it has no substance." It was true that in some cases the identification of comparators did require an input from the respondent, but in the present case there was, on the tribunal's finding, no scope for an argument that there was an appropriate comparator. Rule 13(2) of the Employment Tribunals Rules of Procedure 1993 provided the power to strike out any originating application on the grounds that it was "scandalous, frivolous or vexatious". The applicant complained that the proceedings had been struck out without hearing evidence, but the rules envisaged that if a matter was plain without the need for evidence the claim should be struck out. It was submitted that the words "scandalous, frivolous or vexatious" were not designed to cover cases where there was no reasonable prospect of success and that if Parliament had intended the power to strike out to be so used it would have said so in rule 13 or have referred to it in rule 7. The appeal tribunal disagreed. It was said that Parliament, by dealing with the prospects of success in rule 7(4), had indicated a narrower meaning for "scandalous, frivolous or vexatious" than in other jurisdictions. The appeal tribunal did not see why that should be so. "Frivolous" often meant lacking in substance, and the words "frivolous or vexatious" had been used in the courts for over 100 years and the *Supreme Court Practice* defined them as applying to cases which were "obviously frivolous or vexatious or obviously unsustainable". The finding that there was an abuse was, strictly speaking, wrong. There was no power to strike out on the grounds of abuse of process. But the finding that the claim was frivolous in that it had no chance of success was one which the tribunal chairman had been entitled to make and there was no error of law in that respect.

Balamoody v UKCC for Nursing Midwifery & Home Visitors; 5 December 2000; EAT/744/99
EAT: Judge Altman, Mrs R A Vickers and Mr G H Wright

COSTS

An employment tribunal dismissed an applicant's complaint of race discrimination and ordered him to pay the respondent employer's costs on the ground that, in bringing and conducting his case, he had behaved frivolously, vexatiously and unreasonably, though not abusively, within the meaning of rule 12(1) of the Employment Tribunals Rules of Procedure 1993.

MR RECORDER BURKE QC, dismissing the applicant's appeal against the costs order, said that the ground of appeal was that the employment tribunal had erred in law in their interpretation of the way in which evidence had been given at the hearing so as to conclude that the applicant's conduct in pursuing his claim was capable of being frivolous, vexatious or otherwise unreasonable, when there had been no strike out proceedings on the basis of lack of merits and no costs warning. The appeal tribunal wished to make clear that employment tribunals should always have in mind the very real difficulties which faced a claimant in a discrimination claim. It followed that, in the absence of misconduct, a costs order in a discrimination case was likely to be made only in a very rare and even exceptional case. However, it was for the employment tribunal to decide whether a party had behaved frivolously, vexatiously or otherwise unreasonably and whether to make a costs order, exercising a discretionary jurisdiction. The appeal tribunal did not accept that an employment tribunal could not make a costs order against an applicant simply because there had been no previous application to strike out, no application under rule 7(4) of the 1993 Rules or no warning as to costs. Those were factors which a tribunal might or might not wish to take into account but the appeal tribunal could not see how it could be laid down as a matter of law or guidance that such matters could be preconditions to the exercise of a broad discretion under rule 12. The tribunal's decision was not perverse.

Saka v Fitzroy Robinson Ltd; 14 March 2001; EAT/0241/00
EAT: Mr Recorder Burke QC, Mrs R Chapman and Mr G H Wright

EMPLOYMENT TRIBUNAL

Following the opening by his representative of his complaint of constructive unfair dismissal, an applicant was informed by the employment tribunal that "bearing in mind his resignation letter and that he appeared to be unable to identify any breach of contract, it was the opinion of the tribunal that the applicant's complaint did not have any reasonable prospect of success". The applicant was warned that "if at the conclusion of this case the tribunal considered that he had in bringing these proceedings acted frivolously or unreasonably the tribunal would consider making an award of costs". The applicant then withdrew his complaint and his originating application was dismissed.

JUDGE WAKEFIELD, allowing an appeal by the applicant, said that in normal circumstances where an applicant had withdrawn an originating application and it had been dismissed by an employment tribunal, any appeal against the decision of the tribunal made in consequence of the withdrawal would be bound to fail. The circumstances of the present case, however, were not normal. The way in which the employment tribunal had conducted itself had resulted in a denial of a fair hearing of the applicant's originating application. While a tribunal might, and often should, explore with the parties any perceived weaknesses of the case, either at the outset or during the hearing, and might properly alert a party who might otherwise not know its powers regarding costs, what had occurred in the present case went far beyond the sort of useful dialogue which assisted in resolving or limiting the matters in dispute. The tribunal, in the language it used, even if it was not in fact the case, had demonstrated a concluded view hostile to the applicant. That had caused the applicant to abandon his claim. The appeal tribunal were satisfied that he did that by reason of the pressures he felt to have been exerted by the employment tribunal through their expressed view as to the merits of his case and the possible consequences to him in costs.

Lewis v Kingston-upon-Thames Royal London Borough Council; 3 May 2001; EAT/0221/00
EAT: Judge Wakefield, Mr D J Jenkins and Miss S M Wilson

EVIDENCE

An employment tribunal upheld an applicant's complaint that she had been unfairly dismissed, having found that the question depended to a significant extent on what had happened at a particular meeting and that the tribunal preferred the applicant's evidence. Subsequently, evidence came into the employers' possession which indicated that between her dismissal and the tribunal hearing the applicant had made numerous harassment calls to the mobile phones of executives of the employers. On an application by the employers for review, the employment tribunal revoked its earlier decision and directed a rehearing, on the ground that, had the tribunal been in possession of the new evidence at the original hearing, it would possibly have taken a different view of the applicant's credibility and reached a different decision.

SIR CHRISTOPHER BELLAMY QC, dismissing an appeal by the applicant, said that the applican argued that the employment tribunal had been wrong to take account of facts that had arisen after th termination of her employment which were irrelevant to the question of the fairness of her dismissal, and she relied on *W Devis & Sons Ltd v Atkins* [1977] ICR 662 and *Soros v Davison* [1994] ICR 590. Thos cases, however, were not authority for the proposition that evidence of post-termination events could never be admitted by an employment tribunal if such evidence was relevant to establishing what had in fac happened in the period prior to the termination of the contract. The law was correctly stated in *Harvey on Industrial Relations and Employment Law*, para D1[865]: "in very exceptional cases evidence o subsequent events may be admissible to establish the truth of evidence occurring before the dismissal . . ." Admission of such evidence was likely to be exceptional and employment tribunals needed to be vigilant to ensure evidence of events post-termination was not used to circumvent, by an indirect route, the principles of *Devis* and *Soros*. There was no doubt that the circumstances set out in rule 11(1)(d) of the Employmen Tribunals Rules of Procedure 1993 were satisfied in the present case. It was, therefore, for the employmen tribunal, in the exercise of the wide discretion conferred by rule 11(7), to decide whether the new evidence was such as to justify revoking its earlier decision. In the employment tribunal's view the new evidence cast strong doubt on the accuracy of the applicant's evidence, and it was a case that turned directly on the credibility of her evidence. There was no error of law in the exercise of the tribunal's decision.

Overton v Healthcall Services Ltd; 4 July 2001; EAT/282/01
EAT: Sir Christopher Bellamy QC, Mr W Morris and Mrs R Vickers

JURISDICTION

An employee who failed to attend the hearing of his complaints of breach of contract and breach of his right not to suffer a detriment under section 44 of the Employment Rights Act 1996 had both claims dismissed under rule 9(3) of the Employment Tribunals Rules of Procedure 1993 by an employment tribunal chairman siting alone.

JUDGE PUGSLEY, allowing an appeal by the employee, said that section 4(2) of the Employment Tribunals Act 1996 provided that proceedings specified in section 4(3) should be heard by a chairman alone, but the list did not include a claim under section 44 of the Employment Rights Act 1996. It was submitted by the respondent that rule 9(3) of the 1993 Rules did not require the hearing actually to begin and the employment tribunal to be assembled, but rather only non-attendance at the tribunal. It seemed implicit to the appeal tribunal that, where section 4 required a full tribunal to hear a case, an order dismissing the claim under rule 9(3) could not be made by a chairman sitting alone by virtue of rule 13(8)(b). If Parliament had laid down that a certain matter could only be heard by a full tribunal, then the proper interpretation of rule 13(8) was that only a full tribunal could exercise the power to dismiss under rule 9(3). The question then was whether the chairman's dismissal of the employee's case under rule 9 was still valid as far as it concerned the breach of contract claim, which she was empowered to hear alone. It seemed wholly misplaced to say that if a tribunal had to be fully constituted to hear the section 44 claim a tribunal consisting of a chairman alone could properly exercise its powers in respect of a claim such as breach of contract which did not need a full tribunal. The reality was that, had the chairman appreciated that she did not have power to deal with the section 44 claim, it would have been perverse of her to exercise the discretion to sit alone on another aspect of the case.

Gill v Whitbreads plc; 28 February 2001; EAT/1444/99
EAT: Judge Pugsley, Mrs D M Palmer and Mr G H Wright

PROCEDURE

An employment tribunal refused an application by a respondent employer to adjourn a remedy hearing pending its appeal to the Employment Appeal Tribunal against the decision of the employment tribunal upholding a complaint by the applicant employee following his dismissal.

JUDGE LEVY QC, dismissing an appeal by the employer, said that the law was still as stated in *Medallion Holidays Ltd v Birch* [1985] ICR 578, 584C where the Employment Appeal Tribunal had rejected the argument that that tribunal had power to review interlocutory decisions of industrial tribunals on their merits and had stated that interlocutory matters such as the granting or refusal of an adjournment were wholly within the discretion of the industrial tribunal. There was no authority, nor support from principle, for the employer's submission that while the decision of an employment tribunal was under appeal the tribunal had no locus to deal with the claim in any way, including fixing a remedy hearing. Remedy hearings in small cases such as the present were held while an appeal against the substantive decision was still extant.

John Menzies Ltd v Durrant; 5 December 2000; EAT/1426/00
EAT: Judge Levy QC, Mr P Dawson and Mr K M Young

TRANSFER OF UNDERTAKING

On an application by a trade union complaining of a failure to consult with employees, in accordance vith regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, the mployment tribunal held that the liability to pay compensation in relation to such failure, pursuant to egulation 11, did not transfer to the transferees, on the ground that the liabilities that transferred under egulation 5 were liabilities other than those provided for by the Regulations themselves.

LORD JOHNSTON, dismissing an appeal by the trade union, said that the case raised a sharp issue vhich was not determined by *Kerry Foods Ltd v Creber* [2000] ICR 556. The appeal tribunal was oncerned that, if an employer, intending to transfer all or part of his business in such a way that the 1981 Regulations would apply, knew that any compensation payable by reason of his failure to consult his mployees in advance of the transfer would be transferred to the transferee, there would be no incentive on he part of the employer to conduct such consultation process. Where matters were finely balanced, any onstruction of the words “liabilities under or in connection with any . . . contract” in egulation 5(2) should ensure that the employer had an incentive to comply with the obligations imposed on him in the transfer process. Such a construction required the conclusion that the transferor would retain esponsibility to pay compensation for his own failure to consult with his employees. Accordingly, any obligation to pay compensation in terms of regulation 11 which was a responsibility of the transferring employer did not transfer to the transferee.

Transport & General Workers Union v James McKinnon, J R (Haulage) Ltd; 4 June 2001; EAT/103/01
EAT(Sc): Lord Johnston, Mr A J Ramsden and Mr R P Thomson

WAGES

A nightwatchman who was required to undertake duties during four hours of his 14-hour shift but was permitted to sleep or do other things during the remaining hours he was on the employer’s premises claimed that, in paying him £210 a week for seven 14-hour shifts, the employer was in breach of the minimum hourly rate of pay prescribed by the Minimum Wage Regulations 1999. The employment ribunal dismissed his claim.

LORD JOHNSTON, allowing an appeal by the employee, said that the employment tribunal had taken he view that under regulation 15(1) of the 1999 Regulations the time worked by the employee would not exceed four hours per night and that that should be the proper measure of the extent to which emuneration was required under the Regulations. The appeal tribunal considered that regulation 15(1) did not apply to the employee’s employment. What that regulation was designed to deal with was a situation vhere the employer specifically told the employee that during the relevant working period he was entitled o take so many hours off for sleep. A more apt analogy in the present case was an employer who required his employee to be available for work on his premises and it was his responsibility to provide work for him and if he did not do so he was still required to pay the employee because of the requirement for him to be on he premises. While it might be possible to enter into an average agreement for unmeasured work, if the employment was one to which the national minimum wage legislation applied, it had to be remunerated at he appropriate rate for those hours.

Wright v Scottbridge Construction Ltd; 4 April 2001; EAT/1050/00
EAT(Sc): Lord Johnston, Mr A G McQuaker and Dr W M Spiers

CONTINUOUS EMPLOYMENT

An employment tribunal rejected an employee's complaint of unfair dismissal on the ground that he had not been continuously employed for two years as required by section 108(1) of the Employment Rights Act 1996, where the employee had been dismissed, with others, from his job as a temporary gardener after five months because the money for their employment had run out, and re-employed six weeks later until his dismissal 22 months thereafter.

MR RECORDER UNDERHILL QC, allowing an appeal by the employee, said that the employment tribunal had rejected the employee's argument that the six-week gap in his employment had been "on account of a temporary cessation of work" within the meaning of section 212(3)(b) of the Employment Rights Act 1996, concluding that it was not planned as a temporary cessation of work and that not all those laid off were taken back. It was submitted on behalf of the employee that the tribunal had misdirected itself by treating as conclusive the fact, as it held, that the cessation of work was not "planned" to be temporary. That submission was well-founded. Whether or not a cessation of work was temporary had to be decided with hindsight, i e at the date when the employment finally ended and the question of continuity of employment fell to be determined. Accordingly, it was not sufficient for an employer to establish that at the time the employee was first laid off there was no firm intention to re-engage him at a particular time or at all. It was not submitted that the intention of the parties at the time was irrelevant. On the contrary, the decision was one of fact and degree in which all relevant circumstances were to be considered: those had to include the intention of the parties as to the duration of the lay-off. But the way in which the tribunal had expressed its reasons was not consistent with its having approached the issue in that way. The *only* factor it referred to was the intention of the parties at the time. In particular there was no consideration of the length of the actual period of lay-off relative to the periods for which the employee was employed, and such consideration was essential. Had the tribunal asked itself the correct question, the answer would have been plain. A cessation of work was "temporary" if it lasted only for a *relatively* short period of time. The employee had been employed for five and a half months prior to the lay-off and that employment had been followed by a further 22 months' employment. It was also material that he had been offered at least a reasonable prospect of re-engagement which eventuated shortly afterwards. So short a cessation, against that background, could realistically only be described as "temporary".

Fowler v Southend on Sea Borough Council; 23 April 2001; EAT/1021/98
EAT: Mr Recorder Underhill QC, Mr N D Willis and Mr K M Young

COSTS

A respondent employer was awarded the sum of £500 by way of expenses when an originating application by the applicant employee was struck out by the employment tribunal for want of prosecution and delay.

LORD JOHNSTON, allowing an appeal by the employer against the amount of the award, said that it was self-evident, on the face of the record, that an award of expenses was justified by reason of the applicant's conduct. An award of expenses was governed by rule 12 of the Employment Tribunals Rules of Procedure (Scotland) 1993. The employment tribunal had stated that, as it had no information as to the applicant's means, it was not appropriate to make an order under rule 12(3)(c) and, accordingly, awarded £500, the maximum payable under rule 12(3)(a). The employer submitted that the tribunal had misdirected itself by even addressing the question of means; and that it should have made an award under rule 12(3)(c). The appeal tribunal agreed. Whatever might be the purpose behind rule 12(3)(a), it should not detract from the general entitlement of a party otherwise entitled to expenses to receive the full amount due to them as compensation for the costs they had incurred. The notion of means was more relevant to any question of penalty, and an award of expenses was not, and should not be, regarded as penal. The protection available to the party against whom the order was made was taxation.

Lochgorm Warehouses v Gordon; 4 April 2001; EAT/1223/00
EAT(Sc): Lord Johnston, Mr G R Carter, Ms A E Robertson

DISABILITY DISCRIMINATION

At a hearing for directions on an employee's complaint of disability discrimination, the respondent employer accepted that the employee had a disability for the purposes of the Disability Discrimination Act 1995. Six months later, the employer applied to withdraw the concession. The application was refused by a chairman.

MS RECORDER COX QC, dismissing an appeal by the employer, said that it was argued that the mployment tribunal only had jurisdiction to hear the employee's complaint if he was a person who uffered from a disability within the meaning of the Act and that no party could, simply by making a oncession, confer jurisdiction on a tribunal which it would not otherwise have. In order to succeed in a omplaint of unlawful disability discrimination an applicant had to bring himself within the statutory rovisions and surmount a number of hurdles. One of those was that it had to be proved that the applicant was a disabled person. In some instances, in the course of preparing for a hearing, a concession could be made by the employer that the applicant was a disabled person. Such a concession had clearly been made n the present case, at a time when the employer was represented by solicitors, and the parties had since hen prepared for the hearing on the basis that that issue would not be a matter in dispute as between the arties. That was not a jurisdictional issue but rather an evidential one and there was no error by the hairman in concluding that the employer was bound by that concession and could not apply some six months later to withdraw it. In a letter to the employer's solicitors the chairman had said: "Concession or o concession the tribunal has jurisdiction to hear the applicant's disability discrimination case and the ssue of disability will be an issue for the tribunal to decide having heard all the evidence." That accurately escribed the role of the employment tribunal at the forthcoming hearing. It did not mean that the refusal o allow the employer to withdraw the concession was erroneous.

Ovum Ltd v Tuckett; 17 May 2001; EAT/546/01
EAT: Ms Recorder Cox QC, Mr P R Jacques and Mr J R Rivers

MEDICAL REPORT

On a hearing for directions of an employee's claim of disability discrimination, an employment tribunal chairman directed the employee to disclose to the employer a report she had obtained from her eneral practitioner. He further directed that the employee would, if required, make herself available for xamination by the employer's medical expert, setting out in the order a whole series of matters to be ddressed by that expert, and ordered that copies of the expert's report should be filed with the tribunal nd served on the employee. The employer sought confirmation that it was only required to disclose the eport if disability remained an issue and the employer intended to rely on it. The chairman's reply was hat it had to be disclosed in any event, and that the question of legal professional privilege did not pply.

LINDSAY J, dismissing an appeal by the employer on the issue of disclosure, said that the employer, ightly, asserted that legal professional privilege applied to tribunals as it did in civil courts generally. The Civil Procedure Rules 1998 had, however, introduced a rather different regime as to experts' reports. A distinction needed to be drawn between an advisory expert, whom a party consulted privately without ny assistance from the court, and whose existence might even be unknown to the other side, and an expert tribunal witness who was instructed as such during the proceedings and whose role was known to the other ide from the start. Here the tribunal's assistance had been invoked from the start, and the tribunal had tself specified the questions the expert was to address. The employee would know the identity of the mployer's expert. In those circumstances, the nature of the order was such that the report would be a CPR Part 35 expert's report. The duty of the expert would be to the tribunal not simply the payor. That ind of report was not subject to legal privilege. The whole approach of the CPR was for "cards on the able". The employer would see the employee's report from her general practitioner; and, similarly, the mployer was required to disclose its report. It might be said that that put the employee in a favoured osition. She might have consulted any number of experts and chosen the only one in her favour. That nequality between the parties was capable of being overcome by requiring the employee, at the point of eceiving a copy of the report from the employer, to disclose on oath every communication, received within he period beginning six months before the presentation of her originating application, which reported on ny of the matters specified in the directions order. If she chose not to reveal any such reports, she would ot see the employer's report.

Department of Health v Bird; 17 July 2001; EAT/668/01
EAT: Lindsay J, Mrs T A Marsland and Mr J R Rivers

RACIAL HARASSMENT

An employee who was black regarded as racially offensive a postcard sent to work by a white colleague which depicted a group of bare-breasted black African women with the comment "South Africa's answer o Mayfair". An employment tribunal found that the act of sending the card was race specific and upheld a omplaint by the employee against his employer of unlawful race discrimination.

JUDGE PETER CLARK, dismissing an appeal by the employer, said that the employee's complaint was of direct unlawful race discrimination, and, by a combination of sections 1(1)(a) and 4(2)(c) of the Race Relations Act 1976, the employee had to show less favourable treatment on racial grounds that was o his detriment. In some cases—characterised as cases of racial harassment—that statutory process was hort-circuited. Racial (or sexual) harassment was not defined by statute. The kind of conduct which constituted such conduct could be and usually was race (or sex) specific. As a practical matter, a true cas of racial/sexual harassment would, by its factual nature, encompass the necessary ingredients of les favourable treatment, racial/sexual grounds and detriment. The difficulty arose where the facts did no immediately lead to the conclusion that racial/sexual harassment had occurred. In those circumstance there could be no substitute for the words of the statute. Was the act of sending the postcard so obviousl detrimental that it was disadvantageous to the applicant as a black employee by undermining his dignity a work? That question was to be answered by considering a combination of factors: the employee' subjective perception, the motive of the alleged discriminator (the sender of the postcard), how, objectively the reasonable black employee would react to the treatment complained of and whether he would regard i as being to his detriment. Those factors were not inconsistent with the principle that the discriminator' motive or intention was irrelevant to proof of less favourable treatment on racial grounds, rather that, i bad motive was made out, the applicant's case became so much stronger. The tribunal's conclusion tha the case was one of race specific behaviour amounting to unlawful discrimination was a permissibl option. Objectively viewed, the postcard with its comment was racially offensive: it landed on th employee's desk with other, white, colleagues laughing; he was genuinely distressed by it; and that was no an over-reaction in the tribunal's view. It passed the racial harassment test.

Chief Constable of the Kent Constabulary v Kufeji; 4 May 2001; EAT/1135/00
EAT: Judge Peter Clark, Ms N Amin and Miss S M Wilson

REVIEW

A chairman promulgated a decision by which he dismissed, on withdrawal by the applicant, her claims for redundancy payment and breach of contract and stated that her claims for unfair dismissal, unpaid wages and insolvency payments remained live. The applicant sought a review of the decision, and the same chairman, sitting alone, allowed the application for a review and went on to confirm his original decision.

HOOPER J, allowing an appeal by the applicant against the review decision, said that the principal issue for resolution was whether the chairman, not having dismissed the review application summarily under rule 11(5) of the Employment Tribunals Rules of Procedure 1993, could himself conduct the review. The chairman, sitting alone, had the jurisdiction to make the original decision, that is to dismiss the claims if they had been withdrawn. Under rule 11(5) he had jurisdiction, sitting alone, to decide whether to dismiss the application for a review on the ground that it had no reasonable prospect of success. It might be thought that, having decided that he would not summarily dismiss the application for review, he would have the right to continue and review the decision, but that was not the case. Although rule 11(6) provided that a review should be heard by the tribunal "which decided the case", which must include the making of a decision as well as the deciding of a case, so far as rule 11(6)(b) was concerned, the decision to dismiss the applicant's claims was a decision made by the chairman acting alone under rule 13(8). It did not appear that the chairman had been specifically appointed by the President or the regional chairman to conduct the review. There was, however, a further difficulty. Rule 13 limited the circumstances in which a chairman acting alone could do any act required or authorised by the Rules to be done by a tribunal. One of the things a chairman sitting alone could not do by virtue of rule 13(8)(c) was to conduct a review of a decision under rule 11(11).

Fox v Willis Howells Financial Services; 1 March 2001; EAT/53/00
EAT: Hooper J, Lord Gladwin of Clee and Mr T C Thomas

REVIEW

An employment tribunal upheld an employee's claim of sex discrimination, preferring the evidence given on her behalf to that from her employers. A tribunal chairman, sitting alone, refused an application by the employer for a review, made on the grounds that new evidence was available and that the interests of justice required it, holding that a review would have no reasonable prospect of success.

NELSON J, allowing an appeal by the employer and remitting the matter of a review for the consideration of the full employment tribunal, said that the appeal was made on the ground, inter alia, that no chairman alone could or should have considered the application himself and concluded, by himself, that the review had no reasonable prospect of success. Rule 11(5) of the Employment Tribunals Rules of Procedure 1993 gave the chairman a very valuable power to act as a filter, to exclude those plain and obvious cases that had no reasonable prospect of success. That was a power that was necessary and that should not be unduly restricted. The only restriction that could be placed on it was that the chairman must exercise it judicially. It was submitted that, in the circumstances of the present case, where there was a factual, and closely contested, dispute that was at the heart of the matter, any decision on a review had to be decided by the whole fact-finding body. Reliance was placed on *Hancock v Middleton* [1982] ICR 416, 419G–H, as indicating that, where there was material which should be investigated, it was appropriate and proper for the matter to go back to the full tribunal for hearing, rather than being dealt with by the chairman alone. The appeal tribunal had to consider whether there was material for the employment tribunal to investigate that was so related to the facts of the case that it should be investigated by the full nel. To say that the whole tribunal should have considered the application to review would not be eaking new ground. It was simply a decision on the facts of a particular case. There had been a closely ught contest on the facts which the tribunal had expressly found difficult to resolve. The key was the fact at the weight to be attached to the new material was difficult for anyone, save the original tribunal, to termine. It was much better determined by them than by the appeal tribunal and should have been termined by them rather than the chairman alone, given that it went to the very heart of the decision that as made.

Tooley v Brimelow; 19 June 2001; EAT/310/00
EAT: Nelson J, Mr D J Hodgkins and Ms B Switzer

CONSTRUCTIVE DISMISSAL

An employee complained to her employers in December 1999 that they had unilaterally altered her jo specification. Thereafter she was off work due to stress caused by her work problems and had no contac with her employers until, in June 2000, she resigned because, though well enough to work, she felt unabl to face returning to the altered job. An employment tribunal found that she had been constructivel dismissed and upheld her complaint of unfair dismissal.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that th employee had, by her actions or inaction, affirmed the contract; that affirmation was a question of mixe fact and law; and that, by simply addressing itself to the question of whether it was reasonable for th employee to have delayed resigning, the employment tribunal had not addressed the correct question. I was important to emphasise, on the question of affirmation in the face of a breach of contract justifyin repudiation of the contract by the employee, that it was only the employee who could effect affirmation and that it could be done either positively, in the sense of a positive acceptance whether by word or act, o impliedly provided that the conduct of the employee pointed unequivocally to such an acceptance. Dela was obviously a factor in considering whether that had been established, but it was necessary to examine the reasons for that delay in order to determine objectively whether affirmation had in fact been established on an implied basis. In the present case the reason for the employee's illness was, effectively, the circumstances surrounding what the tribunal had categorised as a fundamental breach of contract. The employers neither related the illness to that situation nor took any steps during the period in question to indicate to the employee that they were prepared to address her grievances. Thus, when fit for work, the employee found herself in precisely the same position as she had been in when the breach of contract materialised. Against that background, it was entirely reasonable for the tribunal to conclude that there had been no affirmation by the employee.

Bruce Anchor (Scotland) Ltd v Turbert; 12 September 2001; EAT/455/01
EAT(Sc): Lord Johnston, Mr G R Carter and Ms A E Robertson

CONSTRUCTIVE DISMISSAL

An employment tribunal rejected an employee's claim that by failing to provide her with work to do, in the course of 1999, her employers were in breach of a fundamental term of her contract of employment justifying her resignation on 30 September 1999, and held, on her complaint of unfair dismissal, that she had not been constructively dismissed.

LORD JOHNSTON, dismissing an appeal by the employee, said that the employment tribunal's decision was wholly defective when it came to its reasoning. The appeal tribunal was very conscious of the fact that it must not substitute its own views on the evidence for those of the tribunal which heard the matter and could only deal with errors of law. The appeal tribunal was, however, prepared in the present case, for practical reasons and without setting any precedent, to examine the findings of fact stated by the employment tribunal to determine whether the conclusion to which it came could be supported. In general terms, an issue might well arise as to whether an employer was under a duty to provide work for an employee so long as he was not breaking the employee's contract and continued to pay the employee. Redundancy might arise in a constructive dismissal situation, and a conclusion that the real reason for dismissal was redundancy was not necessarily inconsistent with a finding that the employee was nevertheless constructively dismissed. An employee, however, had no right to redundancy, and the issue of redundancy was peripheral, if not irrelevant, to the basic issue in the present case, namely, whether the conduct of the employer in not offering work to the employee but nevertheless requiring her to remain on the books because they valued her qualifications, was such as to entitle the employee to resign. The test in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221 was that, whatever term of the contract was breached, it must in its breach go to the heart of the contract. Whether the matter was looked at from the context of an implied right of an employee to receive work from the employer during the currency of a contract of employment, or from the point of view of a mutual need for trust and confidence, there could be circumstances where the failure to offer work to an employee who was nevertheless being otherwise treated as an employee in terms of her contract could amount to a term capable of breach. The issue was one of degree. Failure to offer an employee work for a considerable period of time or at least without any definite limit of time could amount to a failure on the employer's part properly to perform the contract, thus creating a material breach entitling the employee to resign and claim constructive dismissal. However, on the evidence, the present was not such a case. The employer had an overriding requirement to restructure, to save money. The failure to offer the employee redundancy had probably triggered her resignation. But the time period involved did not amount to a sufficiently material breach, if any, of any obligation on the nployer to find work. The employment tribunal, therefore, came to a decision that was tenable on the idence.

Cerinus v Bell College of Technology; 3 October 2001; EAT/218/01
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

OSTS

On a pre-hearing review of claims by 13 employees of unlawful deduction of wages, an employment bunal chairman made an order under rule 7(4) of the Employment Tribunals Rules of Procedure 1993 quiring the applicant employees to pay a deposit of £50 each as a condition of pursuing their claims, on e ground that the claims had little prospect of success. At the substantive hearing of the claims the nployment tribunal found against the applicants and, having considered the chairman's reasons for dering the payment of deposits, made an award of costs under rule 12(7) for the payment of £100 by ch applicant.

DOUGLAS BROWN J, allowing an appeal by the applicants against the order for costs, said that it was bmitted that the tribunal's reasons for awarding costs did not deal with whether the applicants had haved unreasonably in conducting the proceedings to a determination; that there had been an ordinary bunal dispute where there was a conflict of evidence; that the applicants were entitled to know why it as said, if that was the decision, that they had behaved unreasonably; and that it was not sufficient to say at the reasons at the pre-hearing review were substantially similar to the reasons for the tribunal's cision. In the view of the appeal tribunal, the order for costs could not stand. Nowhere in the reasons d it appear that the words of rule 12(7) of the 1993 Rules, in relation to unreasonableness, had been ldressed or how the matter had been decided. It was not enough to compare the decision on paper at the e-hearing review with the decision of a tribunal after oral evidence. It was important to compare the two id to ask if they were substantially the same but it was not decisive of the matter. The question of ireasonableness had to be addressed. If it had been, the tribunal would have been obliged to have regard its own reasons in dismissing the applications. Nowhere in the reasons was the bringing of the oceedings or the conduct of them criticised. It would be wrong to say, in the circumstances, that the plicants were unreasonable in persisting in bringing their claims. There had been a straightforward nflict of evidence; the result was not inevitable; and it was certainly not unreasonable to pursue the atter to a determination.

Gardiner v VAW Motorcast; 18 July 2001; EAT/262/00
EAT: Douglas Brown J, Mr B Fitzgerald and Mr G H Wright

MPLOYMENT TRIBUNAL

An employee's claim of unlawful deduction of wages under section 23 of the Employment Rights Act 96 was directed by an employment tribunal chairman to be heard by a chairman sitting alone in cordance with section 4(3) of the Employment Tribunals Act 1996. A chairman heard oral evidence on sputed facts and dismissed the claim. No reasons were given at the time for the decision that the claim ould be heard by a chairman alone, but, after the employee had lodged an appeal, the first chairman said at there had not appeared to him to be a sufficient likelihood of a dispute on the facts to direct a hearing a full tribunal and the second chairman said that nothing on the face of the pleadings led her to consider at the complaint should be heard by a full tribunal.

DOUGLAS BROWN J, allowing the appeal by the employee, said that in fact the pleadings showed at there was a stark factual conflict between the parties. In *Sogbetun v Hackney London Borough uncil* [1998] ICR 1264 Morison J, giving the judgment of the Employment Appeal Tribunal, made a imber of significant remarks which formed the clearest guidance as to how chairmen should approach eir task under section 4 of the Employment Rights Act 1996. In the present case, both chairmen had llen into error in not announcing or making known the reasons for their decision and in not seeking the ews of the parties, as it was said in *Sogbetun*, at pp 1269D–E,1270D, that they should. As to whether the st chairman dealt with the statutory requirements so that there was nothing left for the second chairman do, the better view was that the listing chairman exercised discretion on the material before him, then ien the matter came on for hearing there was a continuing duty to review the earlier decision, reflected in e words "at any stage of the proceedings" in section 4(5) of the 1996 Act; and, where the parties turned with a number of witnesses, that ought to be a clear indication that it was a case where the advantage of ull tribunal should be had: see *Post Office v Howell* [2000] ICR 913, 919C–D.

Clarke v Arriva Kent Thameside Ltd; 25 July 2001; EAT/341/00
EAT: Douglas Brown J, Mr J R Crosby and Mr P R Jacques

ROTECTED DISCLOSURE

A consultant psychiatrist employed by a healthcare trust wrote to a nun employed as a psychiatric cial worker because she was concerned that she wore a habit and headdress when visiting patients in the community, and, when a meeting was called by the trust's nursing director to discuss the issue, th consultant spoke to a journalist, getting her views raised publicly in a newspaper article. The consultant contract was terminated early and it was agreed that the trust would give her a reference. The referenc provided set out in detail how she came to leave its employment and concluded that it would not b prepared to re-employ her. She complained to an employment tribunal that, for the purposes o section 47B of the Employment Rights Act 1996, she had been subjected to a detriment on the ground tha she had made protected disclosures. The tribunal dismissed the complaint.

DOUGLAS BROWN J, dismissing an appeal by the applicant, said that the issues were whether th disclosures amounted to "qualifying" disclosures within the meaning of section 43B of the 1996 Ac whether, if they did, they had been made in accordance with sections 43C–43H, and whether, if so, th applicant had been subjected to a detriment on the ground that she had made those disclosures. Th employment tribunal took the view that the applicant had no reasonable belief that the health and safety o any individual was likely to be endangered and had not, therefore made a "qualifying disclosure". It foun that she had an ulterior motive, namely, the appointment of the nun per se, evidenced by a challenge to he competence, and that disclosure to the press was not reasonable in all the circumstances of the case section 43G(1)(a)(e). The tribunal took into account that the disclosure was made to a journalist rathe than a professional body and that the wearing of the habit was not a matter of urgency, as there was n evidence of any complaint or adverse patient reaction. Finally, the tribunal found that the applicant di not suffer a detriment as a result of the disclosure. There was an obligation to provide an accurat reference, and the reason for the contents of the reference was the breakdown in the working relationshi between the applicant and members of her team. In other words, there was no causative link between th disclosure to the press and the reference even though it was mentioned in the reference. In the view of th appeal tribunal, the employment tribunal came to a correct conclusion in respect of all those matters. I was clear from the facts found that the applicant's reason for going to the press was for her own protection largely her good name. Questions of good faith could be safely left to the experience and judgment of th employment tribunal.

Bright v Harrow & Hillingdon Healthcare NHS Trust; 26 July 2001; EAT/115/01
EAT: Douglas Brown J, Lord Davies of Coity and Mr P D Wickens

UNFAIR DISMISSAL

When dismissing an employee's complaint of unfair dismissal, an employment tribunal failed to specif which of several reasons relating to the employee's conduct was the actual reason for dismissal.

JUDGE PETER CLARK, allowing an appeal by the employee, said that it was necessary to set out the steps which an employment tribunal should take when considering the statutory questions raised by section 98 of the Employment Rights Act 1996. (1) What was the employer's reason for dismissal? The reason for dismissal was the reason, or set of facts or beliefs, held by the employer at the time of dismissal that is on the effective date of termination of the employment. (2) Had the employer shown a potentially fair reason for dismissal? (3) If so, had the employer acted reasonably in treating *that* as a sufficient reason for dismissal? That question had to be determined in accordance with equity and the substantial merits of the case: section 98(4)(b). That question in turn raised a number of issues: (i) in a conduct case, whether the employer had carried out a reasonable investigation and whether he had reasonable grounds for holding an honest belief that the employee was guilty of the conduct alleged; (ii) whether the employer had carried out a reasonable procedure in arriving at the dismissal decision, and, if not, whether the procedural defect had been cured by a subsequent appeal which operated as a rehearing rather than a review of the original dismissal decision; (iii) whether dismissal was within the range of reasonable responses open to the employer, within which issue might arise the questions whether the employee had been treated more severely than other employees in comparable circumstances and whether the employee was or ought to have been aware that his conduct was liable to lead to his dismissal. Adopting those stages of inquiry, (1) there seemed to be three possible reasons for dismissal and it was unclear precisely on which reason the tribunal was judging the reasonableness of the dismissal under section 98(4). That was an essential finding, because it was *that* reason which had to be judged for its reasonableness and no other. (2) The relevant reason was that in the employer's mind at the time of dismissal, and it was accepted that that reason was a genuinely held belief related to the employee's conduct. (3)(i) There was no finding as to what investigation was necessary, bearing in mind the reason for dismissal, and there was no finding as to whether the employer had reasonable ground for his belief that the employee had misconducted himself. That was a material omission. (3)(ii) The question raised and not answered by the tribunal was whether, by upholding the original decision to dismiss for a different reason, the employers' disciplinary panel could be said to have cured a procedural deficiency found by the tribunal. (3)(iii) The tribunal had not addressed the question of reasonable responses at all; and more particularly it had made no findings as to whether cases of other employees were truly comparable or the employee's awareness.

O'Connell v Essex County Fire & Rescue Service; 12 July 2001; EAT/1334/99
EAT: Judge Peter Clark, Sir Gavin Laird and Miss S Wilson

[2001] ICR Part 11

CADEMIC APPEAL

When her job ceased to exist, an employee who had been employed as a swimming instructor was ound work as a classroom helper but paid at the higher rate of pay of a swimming instructor. After a omplaint by the employee of unfair dismissal was upheld, the employment tribunal, at a remedies hearing n May 1999, made an order for her to be re-engaged as a primary helper or special needs assistant at the ppropriate rate for the post.

NELSON J, dismissing the employee's appeal against the terms of the order, said that at a further emedies hearing the employment tribunal had held that it was not reasonably practicable for the employer o comply with the order for re-engagement and that, because of a failure by the employee to mitigate her oss, she not entitled to any compensation after November 1998. The employer submitted that in the light f that second decision, the time for appealing which was long past, the points raised in the appeal were urely academic. The appeal tribunal was satisfied that there could be no possible benefit to the employee n pursuing the appeal, and it would be inappropriate in such circumstances for it to hear the matter. While he appeal failed on that ground alone, it was necessary, in view of the absence of the employee, to consider er two grounds of appeal: that no reasons were given by the employment tribunal for the order that the mployer should cease to continue to employ her in the lower grade post at the higher rate of pay; and that he tribunal erred in awarding arrears of pay for the 20 weeks prior to the hearing at the lower rate of pay. hough it was accepted that the extended reasons might not be as full as they might be, the summary easons quite clearly stated why the tribunal was making the order. So, that ground of appeal would fall on he merits in any event. As for the second ground, while at first blush *Electronic Data Processing Ltd v Vright* [1986] ICR 76 was applicable, it was readily distinguishable. It was one thing to say that an mployee was entitled to carry on in her old job at the old rate of pay until the new job was found, but quite nother to say that, where another job had been found and the real unfairness was dismissing the employee ather than allowing her to carry on doing it, the employer should be bound for a considerable period after er actual dismissal to pay her on the basis of the anomalous previous higher rate. On the merits that round would have failed in any event. The appeal tribunal were satisfied that it had been brought home to he employee that the appeal was solely academic and that an application for costs would be made, but she ad nevertheless continued to pursue the matter and made the specific request that it be continued in her bsence. In those circumstances, it was appropriate to award costs against her, and she would be ordered o pay £100.

Carter v Tower Hamlets London Borough Council; 22 June 2001; EAT/1073/99
EAT: Nelson J, Mr I Ezekiel and Mrs R A Vickers

ISABILITY DISCRIMINATION

Employers stopped paying sick pay in respect of absences from work for all employees under whose ontracts such payments were discretionary. The applicant, who was disabled for the purposes of the isability Discrimination Act 1995, made a complaint of disability discrimination. An employment ribunal held, inter alia, that payment of sick pay was a reasonable adjustment within section 6 of the 1995 ct and that, in refusing to pay him sick pay when he was off work, the employers had discriminated gainst the applicant by failing to make a reasonable adjustment contrary to sections 5(2) and 6 of the Act.

MISS RECORDER SLADE QC, when allowing an appeal by the employers on other grounds, said that he employers contended that sick pay was either not within the scope of section 6(1) of the 1995 Act or as excluded by section 6(11). Section 6 plainly applied to monetary benefits as well as to other rrangements. Were that not so there would have been no need for section 6(11). That provision excluded om the application of section 6 any benefit under an occupational pension scheme and other benefits ayable in money or money's worth under a scheme or arrangement for the benefit of employees in respect f specified events including sickness. Further, regulation 3(2) of the Disability Discrimination Employment) Regulations 1996 clearly contemplated that financial benefits fell within section 6. The atural meaning of "scheme or arrangement for the benefit of employees" in section 6(11) did not include ayment of sick pay by an employer to an employee under a contract of employment. Such payments were ade by the employer to, rather than "for the benefit of", the employee. Further, they were made pursuant o the contract of employment, rather than "under an arrangement". Section 6(7) did not preclude a nding which would require the payment of sick pay to the applicant, since the provision that "nothing in is Part is to be taken to require an employer to treat a disabled person more favourably" than others was ade "subject to the provisions of this section". Thus the section 6(1) duty prevailed over section 6(7).

London Clubs Management Ltd v Hood; 18 September 2001; EAT/184/00
EAT: Miss Recorder Slade QC, Mr D J Hodgkins and Mr P M Smith

ILLEGAL CONTRACT

An employment tribunal declined jurisdiction to hear an employee's complaint of unfair dismissal o the ground that the employee had agreed to a contract that was tainted by illegality.

JUDGE ALTMAN, allowing an appeal by the employee, said that the employment tribunal of thei own motion, quite properly, took the issue of whether the employee's contract of employment was legal, a the evidence seemed to indicate that he had received his pay without the employers accounting to th Inland Revenue for tax or National Insurance. The extent to which an employee was to be fixed with th illegality of a contract, so as to be disentitled from bringing any claim upon it, was a matter that had bee considered many times by the courts. Knowledge of the ingredients might not necessarily give rise t knowledge that the Inland Revenue were being deprived or misled, particularly where the employee wa receiving no more than he was entitled to. The employment tribunal, in setting out the principles of law appeared to have attributed to the employee the burden of establishing lack of knowledge. It was not fo the employee to show that he had no knowledge of the alleged illegality. The issue for the tribunal, if th matter was raised of their own motion, was whether they were satisfied that the employee did know of th illegality. It was clear that if the employee did not know of the illegality then he was entitled to rely on th contract. It was not so much whether the employee agreed to a contract as to whether he agreed to an knew about the illegality, and it appeared, on the face of their conclusions, that the employment tribuna had concluded that the fact of the improper amount being paid was sufficient to disentitle the applican employee. If a party was to be disentitled from pursuing his normal statutory right to have his claim fo unfair dismissal heard, on an important issue of legality, it was essential that the decision of the tribuna could be seen clearly in the face of the established legal principles. The issue would be remitted fo rehearing.

Gyaniao v Design Corner Ltd; 15 June 2001; EAT/204/01
EAT: Judge Altman, Mr W Morris and Mrs D M Palmer

PRACTICE

An applicant's particulars of complaint stated that she had not been paid any redundancy money and notice or holiday pay by her former employer. The employer sent a fax to the tribunal saying that his business had closed and his only income was income support. The applicant faxed the tribunal from Greece, saying that the employer had not spoken to the Department of Trade & Industry and as a result they presumed he did not agree that she was entitled to redundancy money, and she asked the tribunal to fax her back if there would be a problem if she did not attend the hearing. The tribunal did not reply. Neither party attended the hearing and the complaint was dismissed on the ground that the IT1 did not give any substantive details in support of the claim.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that, in dismissing the applicant's originating application, the employment tribunal fell into error in a number of respects. (1) It did not, on the face of the full reasons, consider adjourning the hearing. (2) If it did, then it failed to exercise its discretion judicially in circumstances where the applicant had faxed the tribunal the previous day, explaining the reason for her absence and inviting a response. She ought to have been advised of her right to seek an adjournment. (3) In not granting an adjournment the tribunal failed to take into account a relevant factor, namely, that the respondent having failed to enter an appearance no injustice would have been caused by granting an adjournment. (4) In the proper exercise of its discretion the tribunal ought to have granted an adjournment in the circumstances of the case. (5) The tribunal, before dismissing the application, was required to consider the originating material and any written representations. On the material before it (a) the applicant claimed she had been employed by the respondent for seven years and had been dismissed in circumstances amounting to redundancy without a redundancy payment; (b) the respondent had not entered an appearance, nor had he disputed the claim; (c) the applicant had not been asked for further particulars of her claim, either by the respondent or by the tribunal of its own motion. The claim had been accepted. In those circumstances no reasonable tribunal, properly directing itself, could dismiss the application. The case would be remitted for rehearing and the applicant directed to serve full particulars of her claims.

Mills v Johnson; 19 July 2001; EAT/1107/00
EAT: Judge Peter Clark, Mr J R Crosby and Mr D A C Lambert

REDUNDANCY

A part-time teacher, who was told that her teaching hours were to be substantially reduced because of cuts in part-time teaching posts, though the teaching hours for her particular subject were to remain the same, was held by an employment tribunal to have been fairly dismissed by reason of redundancy.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employee, said that by virtue of section 139(1)(b) of the Employment Rights Act 1996 an employee was to be taken to be dismissed by reason of redundancy if the dismissal was wholly or mainly attributable to "the fact that the requirements of that business . . . for employees to carry out work of a particular kind . . . have ceased or liminished . . ." Though there was no specific requirement in the 1996 Act for there to be any consultation n respect of redundancy, it was well recognised that determination of whether a dismissal was fair was ikely to turn significantly on the question of whether there had been sufficient consultation. The employee rgued, first, that there was no redundancy; that there had been no reduction in the requirements for work "of a particular kind"; and that those words could not mean simply teaching but must mean teaching of her ubject. The employment tribunal had not expressly said what constituted "work of a particular kind". To letermine whether that was necessary required resolution of the question whether the work referred to in he statute was that of the employee who was dismissed as being redundant. In other words, if an employer ound that he no longer required employees to perform task A, and because of that dismisses employees ngaged on task B, was the dismissal of the latter by reason of redundancy? Untrammelled by authority, the ppeal tribunal would conclude that the wording of the statute envisaged that the "work of a particular kind" did not necessarily have to be work of the sort which the dismissed employee had been doing. Any potential unfairness that might arise in a "bumping" situation would be resolved by section 98(4) of the Act. *Murray v Foyle Meats Ltd* [1999] ICR 827 emphasised that the language of section 139(1)(b) was implicity itself. It asked two questions of fact: (1) whether one or another of various states of economic ffairs existed and (2) whether the dismissal was attributable, wholly or mainly, to that state of affairs. That was a question of causation. It followed that if the tribunal found as a fact that the requirements of he employer's business for employees to carry out work of a particular kind (part-time teaching) had ceased or diminished, and if they found as a fact that it was by reason of that reduction in requirement that he employee was dismissed, they had asked themselves all the questions the statute required. They did not need to go further to ask whether the reduction in the requirement of the employer was for work of the particular kind which the employee herself did. Whether her dismissal was fair, however, depended on what the employment tribunal made of the consultation process, and the tribunal's view that the employer had warned the employee of the possibility of reductions in working hours, and consequent redundancy, which appeared to have been material in assessing fairness, was erroneous. The decision on fairness could not stand and the matter would be remitted for reconsideration.

Stankovic v City of Westminster; 17 October 2001; EAT/696/00
EAT: Mr Recorder Langstaff QC, Mr J R Crosby and Lord Gladwin of Clee

TIME WORK

An employment tribunal held that employees of an organisation which supplied nurses on a 24-hour emergency basis were workers engaged in time work, in accordance with regulation 15(1) of the National Minimum Wage Regulations 1999, when they were awake and waiting to deal with calls at home during night time hours.

JUDGE ALTMAN, dismissing an appeal by the employer, said that, referring to *Sindicato de Medicos de Asistencia Publica v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (Case C-303/98) 2001] ICR 1116, the employer argued that where a worker was employed at home, it was unrealistic to uggest that, merely because he was available to do the tasks to which he had been assigned by his employer, that was being at work. The appeal tribunal had some sympathy with that argument. There did eem to be a qualitative difference between doing assigned tasks while at home and doing assigned tasks while at work. The essential task of a tribunal in seeking to apply the Regulations, or an employer in eeking to adhere to them, was to look at the ingredients of the particular case and the type of work nvolved to see if they could properly be described as work. In the present case the types of thing to be ooked at were the nature of the work in its substance; the extent to which the employee's activities were estricted when not actually answering the telephone; the way in which the parties approached their mutual obligations and the way remuneration was calculated were not conclusive but where pay was calculated by reference to a shift that provided some illustration of the nature of the obligation; and the xtent to which the period during which work was performed was readily ascertainable. In the present case the employee, while working at home, was not able to pick and choose the periods of time during the night when he would answer the telephone; there was a continuing obligation to be available throughout he night, and that was an important element in considering what was work. The variable nature of the number of telephone calls, wholly unrelated to the pay that was involved, also tended to dissociate the ctual periods of answering the telephone from the measurement of the hours of work. On the facts found, he employment tribunal were entitled to conclude that the employees were working. To extract from the night time hours those few minutes when each phone call took place and say that that was work but that he rest was not was really only selecting one type of work in preference to another, by reference to the degree of concentration required. In the context of the facts, there was only a degree of difference between holding oneself ready and obliged to answer the telephone and actually doing so.

British Nursing Association v Inland Revenue; 8 June 2001; EAT/1387/00
EAT: Judge Altman, Mr D A C Lambert and Mr P A L Parker

COMPENSATION

An employment tribunal found that, although the applicant had been dismissed for redundancy, the dismissal was unfair because of there had been no consultation prior to the redundancy. It concluded that had proper consultation taken place, he would have been employed for a further two weeks and it awarded him two weeks' wages as compensation.

JUDGE REID QC, allowing an appeal by the applicant, said that the applicant first argued that there should have been a finding that the dismissal was unfair, not simply for lack of consultation, but also because there should have been a warning of his impending redundancy seven months earlier when the employer knew it was inevitable so that he could have looked for alternative employment. In looking at compensation, where a dismissal was unfair by reason of an employer's failure to go through the appropriate steps before making an employee redundant, the tribunal was not put in any form of straitjacket. Under section 123 of the Employment Rights Act 1996 it had to look at what was just and equitable in all the circumstances. In order to do that in the present case, one had to see if there was a separate duty to warn apart from the duty to consult. Looking at the passages cited in support, in *Rowell v Hubbard Group Services Ltd* [1995] IRLR 195, *Williams v Compair Maxam Ltd* [1982] ICR 156 and *Polkey v A E Dayton Services Ltd* [1988] ICR 142, 162–163, the proposition that there was a separate duty to warn was not made out. Warning and consultation were part of the single process of consultation which began with the employee being given notice that he was at risk. The second ground of appeal was that, in awarding only two weeks' wages, the tribunal incorrectly applied the process for assessing compensatory awards. Although, as the employment tribunal found, the consultation process would not have taken more than two weeks, it did not follow that that process should be taken to have started at the date of dismissal, nor did it follow that the appropriate method of calculating compensation was by assuming that, had a consultation process started on the date of dismissal, the applicant would have been employed for a further two weeks. The reason for the unfairness was the failure to start the consultation process timeously or at all, with the result that he was disadvantaged in seeking another job. In the judgment of the appeal tribunal, he could have started that process 10 weeks earlier and, had he done so, was likely to have had a new job substantially earlier. The employment tribunal had allowed itself to be forced into a straitjacket by what had become a conventional method of expressing the compensation payable in non consultation redundancy cases where the court had held that, had the employer acted properly, the employee would have had a further two weeks' tenure and that that was the measure of his loss. It had to be remembered that the award under section 123 was to be calculated on a more general basis. The applicant lost the chance of being re-employed substantially earlier than he was and the appropriate measure of compensation (in the absence of evidence as to his pay in his new job) was 10 weeks' wages.

Elkouil v Coney Island Ltd; 30 October 2001; EAT/520/00
EAT: Judge J R Reid QC, Mr P R A Jacques and Mr J C Shrigley

COMPENSATION

After 30 years' employment, an employee was selected for early retirement and received a lump sum of £151,474 under the employer's early retirement scheme, the purpose of which was "to provide a superannuation gratuity to participants in respect of past service with the company" and which stated that it conferred "no contractual or other rights or entitlements on any employee". An employment tribunal upheld a complaint by the employee that he had been unfairly dismissed and directed that the employer should be given credit for the payment made to the employee under the early retirement scheme.

JUDGE REID QC, dismissing an appeal by the employee, said that the employee submitted that the sum paid under the scheme should be considered to be a contractual entitlement, which should be left out of account, because it would have been irrational or perverse not to have awarded him the sum. But the words of the scheme itself were paramount and clear; the scheme was, as it said it was and as the employment tribunal concluded, discretionary, the fact that payments under it were described as "pension" being neither here nor there. The cases relating to the taking into account of pensions in personal injury cases were not of assistance, because what one was concerned with in the present case was a statutory compensation scheme not a claim for damages at common law. The requirement in section 123 of the Employment Rights Act 1996 was to determine "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The decision as to whether the payment ought to be taken into account was one for the employment tribunal and there was no error of law in their doing so. Further, they were correct to do so. It was a non contractual payment which would not have arisen but for the employee's dismissal, and the loss he suffered was undoubtedly diminished by the payment. Though the extent of that loss might be affected by the taxation treatment of the sum received, that was a question of the quantum to be taken into account; but the tribunal were right, as a matter of justice and equity, to take into account a payment under the scheme in determining compensation.

Hodes v Marks & Spencer plc; 1 November 2001; EAT/716/00
EAT: Judge J R Reid QC, Mr H Singh and Mr R N Straker

DISABILITY DISCRIMINATION

After nearly 40 years working for his employer, an employee who was profoundly deaf and unable to speak, and who communicated through people who knew him well, was selected for redundancy with six others. Rejecting his claim of disability discrimination, an employment tribunal found that the employee had had the greatest difficulty in understanding the situation when he was told he was being dismissed and had been bitterly distressed at losing his job, but that the cause of his distress was the loss of employment and not any perception that he was suffering from discrimination.

JUDGE REID QC, allowing an appeal by the employee, said that the argument advanced on behalf of the employee was that his selection for redundancy was less favourable treatment within the meaning of section 5(1) of the Disability Discrimination Act 1995 because he was marked down in certain categories because of his disability; alternatively, that the selection criteria placed him at a substantial disadvantage in comparison with non disabled employees so that the employer's failure to adjust them to remove the disadvantage was a breach of section 5(2). The employment tribunal said that, even if he had been marked up to an average mark in the relevant categories, he would still have been one of those made redundant and, therefore, he had not been treated less favourably for a reason relating to his disability. But the position was that the employee was put under a disadvantage because, in relation to the specific categories, his disability affected his marks in a way that it did not affect the marks of those who were not suffering from a disability and because no steps were taken to make any adjustment to take account of the detriment he suffered by being marked down. Accordingly, the tribunal was wrong in holding that there was no discrimination against the employee. There was no suggestion that it would have been impractical to deal with the detriment by some appropriate marking uplift. That said, the fact of the matter was that the employee would, as the tribunal found, have been selected in any event for redundancy. In those circumstances, the appropriate response was to make a declaration that, by applying the criteria it did, the employer discriminated against the employee on the basis of his disability. The second issue in the appeal related to the failure of the employer to take account of the employee's disability in the manner he was informed of his dismissal. The position was that he was not afforded any special treatment. He was, with the others dismissed, told of his dismissal at a single meeting. The tribunal was in error in saying that there was no detriment suffered. It was unlawful for an employer to discriminate against a disabled person whom he employed "by dismissing him or subjecting him to any other detriment", and there was a detriment in bringing a profoundly deaf person in with a group of others who can hear and dismissing him in circumstances where he had difficulty in comprehending what was going on. It was something that could easily have been dealt with by an appropriate adjustment. But it was not a case where it could be said that there had been an injury to feelings by reason of the discrimination and, again, the appropriate remedy was simply to make a declaration.

Berry v GB Electronics Ltd; 17 October 2001; EAT/882/00
EAT: Judge J R Reid QC, Mr A E R Manners and Mr A D Tuffin

EXTENSION OF TIME

An employer presented its notice of appearance to an employee's complaint of unfair dismissal, a month out of time, on the day before that fixed for the hearing. The employment tribunal refused the employer's application for an extension of time, on the ground that the employer had simply not bothered to give the matter any attention until made aware of the hearing, and the tribunal went on to uphold the employee's complaint.

MR RECORDER UNDERHILL QC, allowing an appeal by the employer, said that the essential ground of appeal was that the tribunal had failed to follow the guidance given by the appeal tribunal in *Kwik Save Stores Ltd v Swain* [1997] ICR 49, 54–55, where Mummery J set out the factors to which an employment tribunal ought to have regard in considering an application for an extension of time for entering a notice of appearance. Mummery J pointed out that the length of, and explanation for, the delay would always be an important factor and might be decisive, but also pointed out that it was not the only factor to be considered. The employment tribunal had not approached the exercise of its discretion in accordance with those guidelines and had only considered the first of the factors identified. It had not addressed the question of prejudice or, therefore, the apparent merits of the employee's claim and employer's defence. It followed that its decision was flawed. It was submitted that the guidance in *Kwik Save Stores* was no longer authoritative because, since it was decided, the time for service of a notice of appearance had been extended from 14 to 21 days, but a modest increase in the period allowed could not have affected the questions of principle reviewed in *Kwik Save Stores*. The appeal tribunal had come to the conclusion that it was not possible to say, in the circumstances of the case, that the employment tribunal could legitimately only have exercised its discretion against the employer and, accordingly, it was oblige to remit the application to the employment tribunal for reconsideration. In considering the issue o prejudice, the tribunal could take into account the fact that any award against the employer would [as th tribunal had found] be subject to a very substantial reduction for contributory conduct.

Polygon Corporation v Tregunna; 14 November 2001; EAT/1194/00
EAT: Mr Recorder Underhill QC, Mrs A Gallico and Mrs T A Marsland

PRACTICE

An employment tribunal, upholding complaints by two employees that they had been unfairly dismissed for asserting that their employer had infringed a statutory right, had regard in its reasons to three unreported cases, which had not been cited by the parties' advocates and on which they had not had any opportunity to comment.

JUDGE SEROTA QC, allowing an appeal by the employer, said that, had the three authorities been considered by the advocates, their submissions might have focused on the relevant evidence and the findings of fact that the tribunal should have made. It was not possible to say what the decision might have been in those circumstances. The right to a fair hearing required notice of all material matters of fact and law to be given to the parties if the employment tribunal wished to make determinations on points not argued by the parties. The consideration of the three authorities by the employment tribunal had been material to its decision, since, even though no complaint was made as to the principle to be deduced from them, the application of the principle to the facts had been highly material. Where an employment tribunal considered that an authority was relevant, significant and material to its decision, but had not been referred to by the parties, it should refer that authority to the parties and invite their submissions before concluding its decision. That was more than mere good practice. Failure to do so might amount to a breach of natural justice and of the right to a fair hearing. The failure of the employment tribunal to invite submissions from the parties on the three authorities had doubtless been inadvertent. The tribunal might not have recognised the particular significance it attached to the authorities. There had, however, been significant procedural unfairness and the matter would be remitted to enable the employment tribunal to hear submissions on the three authorities and on any findings of fact that either party might wish the tribunal to make in determining the question in issue. Even though it would have been open to the employer to seek a review of the tribunal's decision, its failure to do so did not preclude its right to appeal.

Albion Hotel (Freshwater) Ltd v Silva; 15 November 2001; EAT/375/00
EAT: Judge D Serota QC, Lord Davies of Coity and Mr I Ezekiel

PRACTICE

Following her resignation from her employment, an employee applied to an employment tribunal for one week's pay in hand and two days' holiday pay for the year 1999 to 2000, to which she claimed to be entitled. The tribunal dismissed both claims but went on to award her three weeks' holiday pay for the year 1998 to 1999.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the Employment Appeal Tribunal had adjourned the preliminary hearing of the appeal on terms that the employer produce certain PAYE records. The employer had complied with that direction, and the employee had written to say that she had been surprised by the award as she had not applied for holiday pay for the previous year as she could not prove either way whether she had been paid it. It was clear that both parties had been surprised by the award of three weeks' holiday pay for a period in respect of which no claim had been made. It was essential if an employment tribunal was to raise a claim not advanced by an applicant that both parties, particularly the respondent, were given a proper opportunity to deal with it both in evidence and in argument. In the circumstances of the present case there had been a breach of natural justice that required the appeal to be allowed and the employment tribunal's award to be set aside. The question then arose as to what should be done. Bearing in mind the principle of proportionality—the award was just under £400—and that, on the material before the appeal tribunal, it appeared that the applicant had received all the holiday pay to which she was entitled for the year 1998 to 1999, the case would not be remitted; instead, the originating application would be dismissed.

Phoenix Catering Ltd v Mayers; 19 October 2001; EAT/302/01
EAT: Judge Peter Clark, Mrs R A Vickers and Mr G H Wright

PRACTICE

In 1997 Companies House advertised internally for a registrar of companies for Anguilla, pursuant to an agreement with the Department of International Development. Two employees applied for the post and, in August 1997, the unsuccessful applicant made a complaint of racial discrimination and ctimisation against Companies House and the department. By a decision, on a preliminary issue as to risdiction, sent to the parties on 6 February 1998, the industrial tribunal held it had no jurisdiction, ecause (i) a person posted abroad would not be a person employed at an establishment in Great Britain for e purposes of the Race Relations Act 1976, and (ii) the interview panel, which consisted of the director of nancial services in Anguilla, a Foreign Office official and a senior officer in the Department of Trade and ndustry, were not employees or agents of Companies House. The applicant appealed and his complaints ere remitted for a fresh preliminary hearing, at which, by reasons dated 12 April 2000, the employment ibunal decided that the decision not to select the applicant was not treatment by Companies House within e 1976 Act, but, if it was, the tribunal would have jurisdiction.

DOUGLAS BROWN J, allowing an appeal by the applicant, said that the applicant had submitted to e tribunal that, where a benefit in the form of secondment was afforded to an employee, the employer ould be liable for refusing such benefit on racial grounds by reason of section 4(2) of the 1976 Act and an mployer could not avoid the reach of section 4 by outsourcing its decision-making. It was submitted, lternatively, that the interview panel were acting as agents for the employer during the selection process. he employment tribunal had made detailed findings of fact as to how the suitable person for secondment ad been selected and come to the conclusion that the employer was not responsible, that its role was onfined to providing nominees for secondment. Nowhere in the reasons was there any consideration of ounsel's arguments, particularly on the issues of vicarious liability, liability for the acts of third parties or gency. It was accepted that those were fundamental issues that needed to be addressed. Looking at the ibunal's reasons, it was not possible to tell what view the tribunal formed of those arguments. That ilure represented a serious flaw in the decision-making process, and the decision could not stand. The pplication was now very stale. If the preliminary issue was heard again a final resolution would be two or ree years away. There was going to be a full hearing on the victimisation issue in any event. The most xpeditious method of dealing with the application was for all matters to be dealt with at the one hearing nd the case would be remitted accordingly.

Willie v Companies House; 3 August 2001; EAT/652/00
EAT: Douglas Brown J, Mrs A Gallico and Mr P R A Jacques

AMENDMENT

At the hearing of an employee's complaints of unfair dismissal and race discrimination, th employment tribunal ruled that it would hear evidence on the merits of the complaints as well as c proposed amendments submitted by the applicant before deciding on the admissibility of the amendmen and whether, if necessary, to extend time to amend the originating application to add further allegations discrimination. The tribunal went on to find in the applicant's favour on the race discrimination claim but found that he had not been unfairly dismissed, and, while rejecting some of the amendments, extende time to allow an amendment in relation to a disciplinary process on the ground that the employers wou not be prejudiced as the matter was well documented.

JUDGE SEROTA QC, allowing an appeal by the employers, said that the employers submitted that th tribunal had only considered questions of prejudice in deciding to permit the amendments, and a numbe of factors had been submitted to the tribunal as being relevant to that decision. The employment tribuna was not wrong in exercising its discretion to decide to hear evidence on the merits of the case generally a well as evidence relating to the proposed amendments and then to rule on admissibility later. Neverthele the fact that the tribunal heard evidence on the substance of the complaint and concluded that th applicant had been treated badly might have blinded it to the need to consider other circumstances whic were or might have been relevant to the application to amend. While guidance given in *British Coal Corp v Keeble* [1997] IRLR 336 should not be regarded as statutory guidance and it would be wrong to seek t cut down the wide discretion given to tribunals to consider all the circumstances and reach decisions whic were just and equitable, the approach of the appeal tribunal in that case was sensible guidance. It require tribunals to focus on *all* the circumstances of the case, a number of which required specific consideratio including the length of delay, the reasons for the delay and whether those reasons were good. There was growing recognition of the importance of parties adhering to time limits, and, while failure to comply wit a time limit without good reason was not necessarily of itself a reason to refuse to extend time, the tribuna had apparently failed to have regard to the delay, the reasons for the delay and the fact that there appeare to have been a conscious decision by the applicant to take no action despite having received legal advice. I might well be that the applicant would be in a position to provide a satisfactory explanation which would enable the tribunal to exercise discretion in his favour. However, it seemed that the tribunal was in error in concentrating on the question of prejudice alone. The appropriate course was for the matter to be remitte to be heard by another tribunal.

Direct Line Accident Management Ltd v Zaidi; 25 September 2001; EAT/384/00
EAT: Judge D Serota QC, Mr W Morris and Mrs D M Palmer

CONTEMPT

In the course of preparing an appeal against a decision of an employment tribunal, the applicant produced a document, described by his then solicitors, as "our client's transcript of part of the original tribunal hearing". The employment tribunal upheld the respondent's contention that the document was a transcript of an unauthorised tape recording of the proceedings and a contempt of court under section 9 of the Contempt of Court Act 1981. When no explanation whatsoever was given by the applicant as to how the document came into existence, the employment tribunal concluded that the making of the recording was scandalous conduct, and exercised its discretion to strike out the proceedings.

JUDGE PUGSLEY, dismissing an appeal by the applicant, said that, as a general proposition, it would not be right to strike out a case because someone had taped part of the proceedings. However, where, as in the present case, there was an obdurate refusal to explain what had happened, to admit it on overwhelming evidence, it was well within the discretion of a tribunal to take the course of striking out. The employment tribunal, in other parts of their reasons, had taken a robust view of allegations made against chairmen in their area and not struck out the applicant's case. But, faced as they were with remorseless and inexorable evasiveness on what was clearly a transcript, they were entitled to take into account not only that a transcript had been made by a tape recorder but the applicant's total refusal to accept or apologise for that. The refusal to provide an explanation for a prima facie breach of section 9 of the Contempt of Court Act 1981 was so unreasonable that the claim could have been struck out perfectly properly on that basis in any event. The appeal would be dismissed on that basis, and only if that decision were to be reversed on appeal would the following issue arise. The employment tribunal had considered that a victimisation claim advanced by the applicant was indistinguishable from that in *D'Souza v Lambeth London Borough Council* [2001] EWCA Civ 794, where the Court of Appeal had concluded that an employment tribunal had had no jurisdiction to consider a claim by a former employee alleging discrimination in non compliance with an order for reinstatement. The appeal tribunal had been informed that leave to appeal to the House of Lords had been received in *D'Souza's* case. It would be appropriate to stay the appeal on that issue until the House of Lords had given judgment in *D'Souza*. It would be quite wrong for the appeal ibunal prematurely to seek to resolve an issue when there was a real possibility that the House of Lords ould give a definitive judgment on it.

Neckles v Yorkshire Rider Ltd; 18 January 2002; EAT/1267/01
EAT: Judge Pugsley, Mrs R Chapman and Mr P R A Jacques

ISABILITY DISCRIMINATION

An employment tribunal found that a disabled employee had not been unlawfully discriminated against hen he was dismissed for prolonged absence from work. The tribunal found that the employer had emonstrated a genuine willingness to consider various options that might assist the employee in returning o work, but that he was not fit to return to work and there was no suggestion when he might be likely to do o and that the dismissal was justified under section 5(3) of the Disability Discrimination Act 1995.

LORD JOHNSTON, dismissing an appeal by the employee, said that section 5(3) of the 1995 Act equired the tribunal to be satisfied that the reasons for the discriminatory act being justified were both aterial and substantial in the circumstances. There was a useful analysis of the section by Arden LJ in *ost Office v Jones* [2001] ICR 805: there had to be a causal connection between the discriminatory act and ie justifying circumstances which had to be material in the sense of relevant, while substantial meant mply more than de minimis. It was important to note from *Jones's* case that the justification need not epend on the tribunal being satisfied that all possible protection had been given to the employee. It was lso important to note, given that the discriminatory act related to how the employer treated the employee, iat knowledge of disability was not necessarily an essential element. In so far as the appeal tribunal might ave suggested in *Quinn v Schwarzkopf Ltd* [2001] IRLR 67 that justification could never occur if the nployer was ignorant of the fact of disability at the relevant time, that went too far. What mattered was o analyse the treatment meted out by the employer. The reason for the dismissal in the present case, as far s the employer was concerned, was the sickness record, failure to respond by correct reporting procedures nd, more importantly, the failure substantially to respond to the employer's various attempts to try and ccommodate the employee in retaining his employment. It was also very important to bear in mind that at ie time of dismissal the employee was not fit for work, nor was it known when he was likely to be so. In iose circumstances, the tribunal reached a correct decision. The reasons for dismissal were both material nd substantial and directly related to the dismissal.

Callagan v Glasgow City Council; 11 September 2001; EAT/43/01
EAT(Sc): Lord Johnston, Miss S B Ayre and Miss A Martin

EVIEW

In October 1995 at a pre-hearing review of an applicant's sex discrimination complaint, an industrial ibunal chairman ordered the applicant to pay a deposit of £100 as a condition of being permitted to ontinue. In November 1995 the chairman refused to review his decision and, in December 1995, struck ut the complaint, the applicant having failed to pay the deposit. Appeals by the applicant against the eposit and striking out decisions were rejected by the appeal tribunal, but in April 1997 the President of ie appeal tribunal directed him to apply to the industrial tribunal to consider his new evidence and review ie deposit order. In May 1997 the tribunal chairman refused to review his deposit decision of October 995 on the ground that the proceedings had been struck out, his order to that effect having been upheld by ie appeal tribunal, and the tribunal was functus officio.

MAURICE KAY J, dismissing an appeal by the applicant against the chairman's refusal to review of Iay 1997, said that it was abundantly clear that an order for a deposit under rule 7(4) in Schedule 1 to the mployment Tribunals (Constitution and Procedure) Regulations 1993 was not susceptible to review nder rule 11, which provided the general power of review, because rule 11 only applied to a "decision" nd the definition of "decision" in regulation 2 of the 1993 Regulations expressly excluded "any other terlocutory order or any other decision on an interlocutory matter". On the other hand there was a line f authority to the effect that, in some circumstances, a deposit decision was susceptible of review under ile 16(1). It was the applicant's case that it remained open to the employment tribunal to review the eposit decision on the basis of a material change in the factual circumstances even after the strike out hich had been subsequently upheld on appeal: *Kuttapan v Croydon London Borough Council* [1999] LR 349. The position was, however, that, the strike out order having been *lawfully* made, there was no risdiction in the employment tribunal to revisit the deposit order pursuant to the Regulations. ule 16 was not a gateway to "directions on any matter arising in connection with" proceedings which had ng since been the subject of a lawful strike out order. That was the difference between the present case nd *Kuttapan*, in which the strike out order had been wrongly made. The respondent employers were orrect in submitting that the tribunal chairman was right to decide that he was functus officio: the nployment tribunal had no jurisdiction to consider reviewing the deposit decision, since it was compelled to regard its decision on the strike out as exhausting its jurisdiction to hear applications in respect of t applicant's complaint: *Aparau v Iceland Frozen Foods plc* [2000] ICR 341, 350.

Armstrong v Devon County Council; 16 January 2002; EAT/484/96
EAT: Maurice Kay J, Mrs R Chapman and Lord Gladwin of Clee

SEX DISCRIMINATION

An employers' staff code for male employees forbade long hair and pony tails, whereas female sta were required only to be neatly groomed. An employment tribunal dismissed a complaint of se discrimination by a male employee, holding that the requirement was one of conventionality of appearan and that the treatment accorded to male employees was not less favourable than that accorded to fema employees.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the employee, said that the central issu between the parties was whether or not the tribunal drew any conclusion as to whether the length of hair c the wearing of a pony tail was within the bounds of what was unconventional. Although the tribunal ha not said so in terms, it was implicit in its decision. In looking at a dress standard a tribunal had first to as whether or not there was a contractual requirement for the standard. Secondly, it had to ask, so far a discrimination on the ground of sex was concerned, whether taken as a whole the dress code wa discriminatory in that the treatment accorded to male employees was less favourable than that accorded t females, or the reverse. As part of that question, the tribunal had inevitably to examine the particula constituent elements of the dress code. That was not to say that men and women had to be treate identically if there was to be no discrimination. It was for the tribunal to decide the scope of its inquiry, bu if the tribunal was examining a dress code as a whole it would inevitably wish to view the component part in order properly to assess the whole. That was no more than saying, in different words, what was said b Phillips LJ in *Smith v Safeway plc* [1996] ICR 868, 876, which was binding on the appeal tribunal.

Fuller v Mastercare Service & Distribution; 24 September 2001; EAT/707/00
EAT: Mr Recorder Langstaff QC, Mr P Dawson and Mr B V Fitzgerald

STATUS OF EXECUTORS

An employment tribunal sitting in Scotland held that it had no jurisdiction to hear complaints of breach of contract and disability discrimination brought by the executors of a deceased claimant on the grounc that there was no statutory equivalent to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which enabled personal representatives in England and Wales to bring such complaints, applicable in Scotland.

LORD JOHNSTON, allowing an appeal by the executors, said that the common law of Scotland had for centuries admitted the right of an executor to pursue claims on behalf of the deceased with some exceptions. The question was whether the discrimination statutes provided one of those exceptions. The appeal tribunal was, therefore, required to search the statute to discover whether that was the case. The shoe pinched tightest with regard to the use of the word "person" [who could bring a complaint] in section 8 of the Disability Discrimination Act 1995 such as was referred to by Stuart-Smith LJ in *Lewisham and Guys Mental Health NHS Trust v Andrews (decd)* [2000] ICR 707, para 20, but the overriding consideration was that an executor was deemed to be the person whom he represented, i e the deceased, and thus the claim being brought by the executor was effectively being brought by the person in question. The 1934 Act was of no relevance, it having been necessary to remove an obstacle existing in the common law of England which did not exist in Scotland, and it was highly significant that the 1934 Act had not been translated into the Scottish jurisdiction, the reason being that it was unnecessary. There was no reason or provision in the statute which precluded an executor from bringing a claim for disability discrimination; and, a fortiori, he was entitled to bring a claim for breach of contract.

Executors of the late Gary Soutar v James Murray & Co (Cupar) Ltd; 7 November 2001; EAT/592/01
EAT(Sc): Lord Johnston, Dr A H Bridge and Mr P M Hunter

WAGES

An employment tribunal found that an essential car user's allowance paid to an employee by his employers fell within the definition of "wages" in section 27(1)(a) of the Employment Rights Act 1996 and was not a "payment in respect of expenses" for the purposes of section 27(2)(b), and that the withdrawal of the allowance was an unauthorised deduction from wages and as such contrary to section 13 of the 1996 Act.

LORD JOHNSTON, allowing an appeal by the employers, said that the allowance had been available on the basis that the person in question had access to a car, and those entitled to the allowance had received a sum of money throughout the calendar year divided into 12 equal installments and also a mileage allowance if the car was actually used for work purposes. One of the issues was whether those two parts of ne allowance should be treated separately. The important principles to be drawn from *Southwark ondon Borough Council v O'Brien* [1996] IRLR 420 and *Johnson v Hampshire Probation Service* unreported) 14 September 1999 (EAT/1144/98) were that generally what could be categorised as llowance, and therefore as expenses, did not necessarily have to meet the precise expenditure incurred. he fact that there was a profit element did not, in an appropriate case, remove the relevant payment from ne notion of expenses if otherwise the relevant criteria were met. Nor could an allowance be apportioned etween the expense element and the profit element. If there was an expense element that was sufficient to ategorise the allowance in question as expenses. The fact that the car was hardly ever used by the mployee was nothing to the point if he was receiving a payment that reflected to some extent inevitable xpenditure relating to the standing charges that a car owner incurred. In any event, the allowance, both in elation to the user's allowance and the mileage allowance, were two sides of the same coin comprising one llowance with two elements in it, and it was inappropriate to distinguish between the two. The proper onstruction to be put on the allowance was one of "expenses" in terms of section 27(2)(b) of the mployment Rights Act 1996, and, in those circumstances, there had been no unlawful deduction of ages.

Dundee City Council v Robertson; 7 November 2001; EAT/595/01
EAT(Sc): Lord Johnston, Dr A H Bridge and Ms A E Robertson

APPEAL

An employment tribunal chairman made an order on a pre-hearing review, pursuant to rule 7 of the Employment Tribunals Rules of Procedure 1993 (in Schedule 1 to Employment Tribunals (Constitution and Procedure) Regulations 1993), requiring the applicant to pay a deposit of £150 as a condition of being permitted to continue with his complaint of disability discrimination.

LINDSAY J, dismissing the applicant's appeal against the order, said that the first issue was whether appeal was possible in a case such as the present. It was plain, looking at the 1993 Rules, that what emerged from the employment tribunal in a rule 7 case was an "order". Section 21(1) of the Employment Tribunals Act 1996 provided that an appeal lay to the appeal tribunal on a question of law arising from a "decision" of an employment tribunal, but the word "decision" was given no defined meaning. References in the 1996 Act to "decisions", "orders" and "awards" were all made without any clear meaning emerging such as to deny the word "decision" in section 21(1) its full ordinary meaning as one capable of embracing any determination, award or order. So far there was nothing pointing to the unappealability of a judgment on a rule 7 deposit being required. Nor was there anything about the subject matter of rule 7 which precluded or suggested the exclusion of appeals on determinations under that rule. It was notable, too, that nothing in the 1996 Act pointed to how, if at all, determinations which were not "decisions" in some special sense were to be appealed, or provided that they should be incapable of being appealed. However, the employment tribunal's order under rule 7, depending on one's definition of "interlocutory", would seem not to be a "decision" within the particular terms of regulation 2(2) of the Employment Tribunals (Constitution and Procedure) Regulations 1993. That, though, of itself would preclude an appeal to the appeal tribunal if it were only "decisions" within that regulation 2(2) special meaning which were permitted to be appealed, and there was no such requirement in the Employment Appeal Tribunal Rules 1993. Rule 3(1) of those Rules contemplated an "order" as capable of being the subject matter of an appeal, and, though it was true that rule 3(2) set the time limit for an appeal by reference to the sending out of the employment tribunal's extended reasons, appealability was not necessarily precluded by the absence of extended reasons, especially where, as in the case of rule 7 of the Employment Tribunals Rules of Procedure 1993, the employment tribunal's own Rules provided for reasons being given only in summary form. The applicant was, therefore, entitled to appeal to the appeal tribunal, and the reasons given by the employment tribunal sufficed for the purpose of instituting the appeal. On the issue of perversity, it was plain that a chairman, while aware that his decision was necessarily provisional and could not be based on the fullest evidence and might later be shown to be wrong, could reasonably have arrived at the view that the applicant's proceedings had no reasonable prospect of success.

Hussain v Addaction; 23 October 2001; EAT/755/00
EAT: Lindsay J, Mrs J M Matthias and Mr R Sanderson

EMPLOYMENT TRIBUNAL

An employment tribunal, on an employee's complaint of unfair dismissal, heard evidence from the employer and decided not to hear any further evidence or submissions on the basis that they had taken the view that the dismissal was unfair, because, although the employer had established an admissible reason for dismissal, the penalty of dismissal for the misconduct in question, namely the theft of a damaged packet of 10 cigarettes, was outside the range of reasonable responses. Some submissions on the merits were then made by the employer, but the tribunal upheld the complaint.

MR RECORDER UNDERHILL QC, allowing an appeal by the employer, said that it was the view of the appeal tribunal that, on the facts, dismissal of the employee was unquestionably within the range of reasonable options open to the employer, though the value of the cigarettes was extremely small and they were not part of the current stock. It was common sense that an employer who had to leave an employee in sole charge of stock was entitled to take the view that any dishonest taking of goods was very serious. Though dismissal would usually be a fair sanction, each case turned on its own circumstances. The conduct and reasoning of the employment tribunal was open to criticism in other respects. As the appeal tribunal made clear in *Hackney London Borough Council v Usher* [1997] ICR 705, 713C–D, it was only in the most exceptional case that it was right for a tribunal in an unfair dismissal claim to reach a decision on the issue of reasonableness, where the burden of proof was neutral, without hearing the evidence of both parties. The present was not such a case. But, in any event, it could never be right for such a decision to be reached without the party going first being given an opportunity to make submissions. Whatever the employer was able to say after the chairman had announced the tribunal's decision, it could not have been fair for the employer to be obliged to make those submissions to a tribunal which had already unequivocally announced its decision. It followed that, even if the appeal tribunal had not upheld the appeal on the ground of perversity, the case would have had to be remitted to another tribunal for a full rehearing.

Tesco Stores Ltd v Othman-Khalid; 21 November 2001; EAT/385/00
EAT: Mr Recorder Underhill QC, Mr P D Wickens and Mr G H Wright

FIXED TERM CONTRACT

A tutor was employed under successive fixed term contracts from the beginning to the end of the academic year, each containing a clause waiving any right to claim unfair dismissal on termination of the fixed term without renewal. When his contract was not renewed and he complained of unfair dismissal, an employment tribunal held that during summer vacations the applicant had been absent on account of a temporary cessation of work and, including the previous summer vacation, the applicant's last contract had been for one year or more, for the purposes of section 197(1) of the Employment Rights Act 1996, and he was precluded by the waiver clause from bringing a complaint.

WALL J, allowing an appeal by the applicant, said that the waiver clause only applied if the applicant's contract was for a fixed term of one year or more, and each of the applicant's contracts had been for less than one year. There was a material difference in law between the calculation of continuity for the purposes of redundancy and the right to apply under Part X of the 1996 Act in relation to unfair dismissal. As far as continuity was concerned, it was common ground, applying *Ford v Warwickshire County Council* [1983] ICR 273, that the applicant was employed throughout the entire period of his employment. But when one came to the waiver clause it was self-evident that each contract contained the same clause, that each contract was distinct and that the waiver was made in relation to each of the contracts individually. Those waivers could not be accumulated. Each had to be looked at separately. If one did that, it was immediately self-evident that the waiver clauses were invalid, since none of the contracts was for a period in excess of one year. The waiver clauses in the individual contracts could not be added up to obtain a period of employment in excess of 12 months for the purposes of section 197(1). There was no discrepancy between calculating a period of continuous employment by reference to the individual contracts and at the same time looking at each contract to see whether the waiver clause was valid in relation to that contract.

Puncher v Bishop Grossteste College; 6 November 2001; EAT/691/00
EAT: Wall J, Mr S M Springer and Miss S M Wilson

SEX DISCRIMINATION

An employment tribunal dismissed a claim by an employee that her employer's failure to allocate shares to her when she was absent form work on maternity leave amounted to sex discrimination under section 1(1)(a) of the Sex Discrimination Act 1975, either because she was on maternity leave or by comparison with two actual male comparators.

JUDGE PETER CLARK, allowing an appeal by the employee, said that it could be inferred from the employment tribunal's reasons that the employee had established less favourable treatment to the satisfaction of the tribunal, and the question was whether that treatment was on grounds of her sex, i e because she was on maternity leave. The tribunal had been persuaded, perhaps by the way in which credibility had been put at the forefront of the employer's submissions, to see the case in stark terms: if the employer's evidence was accepted, then the employee's case must fail; if rejected, then she succeeded. The tribunal accepted the employer's evidence; therefore, the claim of sex discrimination failed. Such an approach was fatally flawed in law. The case was a good example of the principles in *Anya v University of Oxford* [2001] ICR 847 in practice. Instead of looking to the employer for an explanation for the less favourable treatment of the employee, the tribunal asked whether the employer's case lacked credibility. As *Anya* made clear, it was necessary for the tribunal to consider the surrounding circumstances relied on by the employee in support of her claim. That the tribunal had manifestly failed to do, contenting themselves with deciding the case solely on the credibility of witnesses. The tribunal had referred to the possibility of unconscious discrimination but failed to go on to deal with it on the facts. It was because, as Neill LJ had pointed out in *King v Great Britain-China Centre* [1992] ICR 516, it was unusual to find direct evidence of discrimination that tribunals had to look at all the surrounding circumstances in order to determine whether the employer was motivated by subconscious, not simply conscious, discrimination. The tribunal had failed to do that in the present case. They failed to apply the correct legal test for the drawing of inferences. However, the employee's submission that the tribunal's conclusion was one which no reasonable tribunal, properly directing themselves, could reach could not be accepted. Accordingly, the case would be remitted for rehearing before a fresh tribunal.

Hayes v Charman Underwriting Agencies Ltd; 19 December 2001; EAT/242/00
EAT: Judge Peter Clark, Mr D A C Lambert and Miss S Wilson

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint of unfair dismissal, holding that, although no reasonable employer could have concluded from the facts that the employee had attempted to defraud the employer by falsely claiming sick pay, which was the sole reason relied on by the employer, the employer's true reason was its concern to be seen to be tackling absenteeism and the employer had acted reasonably in dismissing the employee for that reason.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employee, said that the first and only suggestion of there having been some other and distinct reason for the employee's dismissal had come from the tribunal chairman during the employer's evidence. The evidence was concluded without any further specific reference to the chairman's suggestion that the dismissal might have been justifiable for some other reason than the employee's misconduct, and the employee's representative made no submissions on the possibility of such an alternative reason being relied on by the employer. The tribunal erred in law in basing their decision on their own assumption of an alternative and separate reason for dismissal, when the employer had never put it forward as a separate and independent ground divorced from the misconduct allegation and the possibility had only been touched on by a suggestion from the chairman part way through the evidence and never properly introduced as an issue. The relative informality of proceedings before employment tribunals meant that they were not bound by strict and formal rules of pleading, so, although it was always desirable for matters in issue to be defined beyond doubt by amendment, the important question was not a formalistic one. Instead, it was the practical consideration of whether any alternative reason to be relied on in favour of the employer under section 98(1) of the Employment Rights Act 1996, and most importantly any alternative factual basis to establish such a reason, had been raised clearly enough as a question needing to be addressed, so that the applicant had a fair opportunity of addressing the case he had to meet and deploying his own evidence and argument on any issues that raised. (See *Murphy v Epsom College* [1983] ICR 715, 723, and *Hannan v TNT-IPEC (UK) Ltd* [1986] IRLR 165, para 22.) In the present case it could not be said that the alternative reason for dismissal suggested by the chairman was simply another way of labelling the dismissal actually imposed by the employer for misconduct and fraud. It was necessarily independent of the misconduct charge, which the tribunal quite properly held unsustainable, and raised additional issues of fact. Nor could it be said to have been introduced with anything like the clarity to make it into an issue "expressly ventilated" in the proceedings [see *Murphy*]. The factual case it involved under section 98(1) was necessarily inconsistent with the employer's actual reliance on fraudulent misconduct maintained throughout the evidence. The tribunal erred in deciding the case on that ground. The appeal was also allowed on the ground that no reasonable employment tribunal could have held a summary dismissal for such a reason—the desire of the employer to be seen to be tackling the absenteeism problem—to be within the band of reasonable conduct for a reasonable employer on the facts.

Leeson v Makita Manufacturing Europe Ltd; 20 December 2001; EAT/911/00
EAT: Mr Commissioner Howell QC, Mr J Hougham and Mr R Thomson

UNFAIR DISMISSAL

Preliminary issues were directed to be determined, on an employee's complaints of unfair dismissal and sex discrimination, as to whether, inter alia, she could raise health and safety grounds such as would make any dismissal unfair. A chairman hearing the issues decided that the employee, a trainee registrar, was not entitled to complain that she was dismissed for a reason which fell within section 100 of the Employment Rights Act 1996.

LINDSAY J, on appeal by the employee, said that the judgment related to one of three appeals in the proceedings. The employee had been acting in person and the task had plainly become burdensome, with issues as to her health and questions of adjournment being raised. The matter had a long history, and, bearing in mind the need to be just to both parties, the appeal tribunal had moved on to hear the substance of the appeals, in the absence of the employee. The first appeal concerned section 100 of the 1996 Act. The employer's case had been that section 100 was concerned with dismissal for reasons connected with health and safety only where the risk was to employees, including the applicant; that the provision was enacted to comply with Directive 89/391/EEC, the terms of which were expressly limited to workers and did not extend to problems related to patient care, in the way argued by the employee. The employee had argued that section 100(1)(e) could have been, but was not, phrased to refer to other workers or other employees. The tribunal held that section 100 should be interpreted as limited to the ambit of Directive 89/391. It was to be noted, however, that, whereas in paragraphs (a) and (b) of section 100(1) where "health and safety" was mentioned the words "at work" were added, in paragraph (c) they were not, and in paragraph (e) there was just a reference to "other persons", which on the face of things meant exactly what it said. There was no reason, in point of construction, to limit the ambit of paragraphs (c) and (e) to harm or possibilities of harm at the dismissed employee's place of work or to his fellow employees, or to any employees. The reasoning of the employment tribunal could not be supported. Though it seemed extremely unlikely that the employee's case, as so far raised, did fall within section 100, unfortunately, the employment tribunal never seemed to have considered whether it did. It never looked, so far as one could see, at precisely what her complaints were or to examine whether they could or did fall within section 100. A crucial part of the ıse was, therefore, left unconsidered by the tribunal. The combination of unsupportable reasoning oupled with that failure amounted to a material error of law. So, provisionally, there was a case for emitting the matter. But whether that would be appropriate turned on other parts of the appeal, to be onsidered later.

Von Goetz v St George's Healthcare NHS Trust; 18 October 2001; EAT/1395/97
EAT: Lindsay J, Mr P A L Parker and Mr G H Wright

APPEAL

An employment tribunal upheld an applicant employee's claim to be entitled to a full statutory redundancy payment from his employer, a limited company. The company lodged an appeal but was subsequently the subject of an administration order and solicitors acting for the joint administrators indicated to the Employment Appeal Tribunal that there were insufficient funds to continue with the appeal.

JUDGE PETER CLARK, dismissing the appeal, said that the applicant's solicitors had written to the Employment Appeal Tribunal asking the tribunal to dismiss the appeal without the need for them to instruct counsel to oppose it. The solicitors for the administrators had indicated that they were instructed to take no further steps in the appeal. On the appeal Miss McCann of counsel appeared for the applicant. The employer did not appear and was not represented. Paragraph 13 of *Practice Direction (EAT. Procedure)* [1996] ICR 422 was headed "Disposal of appeals by consent". An appeal might be withdrawn by consent without difficulty. An appeal against a reasoned decision of an employment tribunal would not be allowed by consent without the appeal tribunal first determining whether there was good reason for making the agreed order. Nothing, however, was said about the case in which an appellant did not actively pursue an appeal or withdraw it and no agreement was reached between the parties. In such circumstances the appeal ought to be dismissed without an inquiry into the merits for the following reasons. (1) As between the parties, the respondent was seeking to uphold the reasoned decision of the employment tribunal, and, in the absence of argument from the appellant, the appeal tribunal ought not to interfere with it. (2) It often happened that the point in an appeal was of wider interest, and in those circumstances it would be undesirable for the appeal tribunal to reach a conclusion in the absence of argument from the appellant. It was far better that a decision not binding on other employment tribunals but disposing of the lis between the parties should stand without endorsement or qualification by the Employment Appeal Tribunal.

Robert Fletcher (Greenfield) Ltd v Blakeman; 20 November 2001; EAT/767/00
EAT: Judge Peter Clark, Mr B Gibbs and Mr P D Wickens

COMPENSATION

When assessing compensation for unfair dismissal, an employment tribunal made no award for loss of future earnings, holding that, as the employee was in receipt of incapacity benefit, she was unable to work, had no ability to earn, and, therefore, had suffered no loss. The tribunal also made an award of costs for the remedy hearing against the employee on the ground that she had acted unreasonably, within the meaning of rule 12 of the Employment Tribunals Rules of Procedure 2001, in refusing a reasonable offer from the employers to settle her claim, while expressing the view that in the circumstances it was insulting to the employee for the employers to seek costs against her and suggesting that the order should not be enforced.

LINDSAY J (PRESIDENT), dismissing the employee's appeal against the compensation order but setting aside the costs order, said that the employee asserted, inter alia, that the tribunal had wrongly treated her receipt of incapacity benefit as conclusive of her being unable to work. It had been entirely proper for the employment tribunal to look carefully at the employee's application for incapacity benefit and the incapacity for work questionnaire. The tribunal would not have been justified in jumping from the fact that she was in receipt of incapacity benefit to a conclusion that she was on that account unable to work. Regulation 25 of the Social Security (Incapacity for Work) (General) Regulations 1995 showed that the benefit system was concerned with a form of *deemed* incapacity for work which was not necessarily an actual inability to work. The employment tribunal's statement that "she is *therefore* unable to work" provided some fuel for the employee's argument, but it was difficult to accept that an experienced tribunal would believe that merely because of the receipt of incapacity benefit there was, in necessary consequence, an inability to work. In context, "therefore" could be seen as meaning no more than "in all the circumstances we have described". As such it was a legitimate finding of fact and represented no error of law. As to costs, the tribunal had a broad discretion which made it difficult to point to an error of law. The discretion did, however, have to be exercised judicially. An award of costs was properly a two-stage exercise: first, the question was whether the discretion under rule 12 of the Employment Tribunals Rules of Procedure had arisen—that was answered affirmatively—but the second question was whether that discretion should be exercised and if so what award should be made. That question did not seem to have been considered. Further, the tribunal's curious remark about it being insulting for the employers to seek costs and the expression that consideration might be given to not enforcing the costs order could only be explicable as it being the wish of the tribunal to put some pressure on the employers not to seek costs by their taking into account in making the order for costs that it might not be enforced. Both those points represented errors of law and the award of costs would be set aside. It was far from an extreme case of a arty conducting proceedings unreasonably. An offer of £1500 had been made relatively shortly before the medies hearing and the award was £1007. While not wishing to deter the making and acceptance of nsible offers, if it became the practice that an applicant who received no more than two-thirds of a sum fered in a rejected *Calderbank* offer was then, without more, to be visited with the costs of the remedies earing, such offers would become frequent, yet it was plain that the legislature had never so provided. he employment tribunals' costs regime was to be distinguished from the costs regime in the High Court nd the county court where costs commonly followed the event and a *Calderbank* offer could be given articular significance.

Monaghan v Close Thornton; 20 February 2002; EAT/3/01
EAT: Lindsay J (President); Mrs M T Prosser and Mr P D Wickens

RACTICE

An assertion by an applicant making an unfair dismissal complaint that she had been employed by the espondent as the "manageress" of a service station since 1993 was directed to be determined as a reliminary issue. The respondent was anxious to obtain a ruling that persons in the position of the pplicant were self-employed franchisees and not employees, and the applicant's case was listed with three milar cases. At the end of the first morning of the three days listed for the hearing, after hearing ubmissions from counsel for the respondent and from the applicant, the tribunal indicated that the pplicants faced the risk of an order for costs if they did not withdraw their claims. The applicant said that ced with the threat of substantial costs she could not go ahead, and the tribunal decision was that the pplication was dismissed on withdrawal by the applicant.

MAURICE KAY J, allowing an appeal by the applicant, said that the picture that emerged was of the espondent seeking to persuade the employment tribunal to dismiss the applicant's application in limine, e tribunal declining to accede to that, but on its own initiative saying to the applicant that if she roceeded she might end up with a substantial order for costs against her. The applicant argued that the mployment tribunal had put her under unfair and inappropriate pressure to withdraw. It was accepted at the employment tribunal had acted at all times in good faith, but if the reality was that the pplicant's withdrawal was caused and conditioned by an unfair and oppressive approach the appeal ibunal was entitled to relieve her from the consequences of that unfairness and oppression. In the dgment of the appeal tribunal, the employment tribunal was wrong to issue the costs warning in the rms it did in circumstances in which it had decided not to accede to the respondent's application for ummary disposal. Moreover, that had all occurred in a jurisdiction in which unsuccessful litigants were nly exceptionally subjected to costs orders and in which the statutory mechanism for discouraging pplicants who had a case which was considered at an early stage to have no reasonable prospect of ccess was the requirement of a modest deposit. Regrettably, the approach of the tribunal had been nfair and oppressive and had left the applicant no other alternative but to withdraw. The appeal ibunal had been referred to statutory provisions and authorities which, the respondent submitted, ould enable the tribunal to allow the appeal and substitute an order dismissing the applicant's pplication, should the tribunal take the view that her case would have been bound to fail in any event. hat that jurisprudence failed to disclose was any case in which the appeal tribunal had substituted its wn decision dismissing an application where there had never been a full substantive hearing. It would ot be right to dismiss the applicant's application in the circumstances. No evidence had been heard and e appeal tribunal had not had the benefit of full argument on the documents. The case would be emitted to a different tribunal, initially for directions.

Gee v Shell UK Ltd; 14 January 2002; EAT/484/00
EAT: Maurice Kay J, Mr J Crosby and Mrs T Marsland

RACTICE

An employee went home from her employment as a cleaner at Heathrow Airport because she was told at she could not continue to work there as she had no security pass. The employee did not return to work elieving that she required a pass. On a complaint of unfair dismissal by the employee, the employers ontended that they had explained to the employee that she did not require a pass and that she was absent om work without authority. The employment tribunal found that, having regard to the fact that the nployee could not speak English at all well and had to rely on an interpreter, the employers had failed to xplain what the position was and the employee had been unfairly dismissed. An application for a review as made by the employers on the ground that a fair hearing had not taken place since they had not been otified that an interpreter was to be used and that the interpreter was in fact the employee's daughter-in-w. The application was rejected.

JUDGE PUGSLEY, dismissing an appeal by the employers, said that the employers contended that it as wrong for the daughter-in-law to act as an interpreter but their real grievance was that they had had no rior knowledge that an interpreter would be used. That was a fair point, but it was not appropriate to lay own guidelines of a far reaching nature as the case could be confined to its own facts. It seemed that the interpreter had been asked two questions by the tribunal chairman along the lines of: "Did the employe feel she couldn't return to the job because of the identification pass?"—answer "Yes"—and "Did she enjo the job?"—answer "Yes, even when she was ill". There was nothing in the decision that one could point t as a major finding of fact relating to that evidence, and, in the context of the case, there was no injustice i the way that occurred. There were always going to be difficulties with interpreters, but tribunals would b able to form a view on the reliability of someone's evidence, albeit that it was given through an interprete Though there was no legal duty, it was good practice for notice to be given where an interpreter was to b used. Further, it might be appropriate either at the directions hearing or earlier for people who were goin to use an interpreter to give an indication, so that the issue was flagged up for the other side. On the fact however, having regard to how evidence from the interpreter emerged, there had been no breach of natura justice.

OCS Cleaning South Ltd v Dhillon; 22 November 2001; EAT/778/00
EAT: Judge Pugsley, Mrs D M Palmer and Mr P M Smith

PRACTICE

At the conclusion of an applicant's evidence an employment tribunal concluded that he had no established that he had been less favourably treated than a comparator and dismissed his complaint of se discrimination. The tribunal took the view that the applicant had acted frivolously and unreasonably i pursuing his complaint because it had no reasonable prospect of success and they ordered him to pay £10 by way of costs.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the applicant against the dismissal of hi complaint and allowing an appeal against the order for costs, said that the appeal tribunal wished to emphasise, yet again, that a tribunal should exercise its power to accept a submission of no case to answe only in exceptional and rare cases. However, the appeal tribunal had been persuaded that the employmen tribunal had been entitled to take the view that it was such an exceptional case. That was because the case that the applicant was advancing had to begin with the proposition that he was comparing like with like. Discrimination existed where someone in like circumstances to another was treated in an unlike manner or where people in unlike circumstances were treated in a like manner. What was in the tribunal's mind was the applicant's inability, having given his evidence and been questioned, to show to their satisfaction that his circumstances were materially similar to those of his chosen comparator. The power to award costs, under rule 12 of the Employment Tribunals Rules of Procedure 1993, should be exercised with restraint because it involved, or might indicate, that the individual against whom the order was made had acted in bad faith. There was an obvious inconsistency between the decision of an employment tribunal chairman at a preliminary hearing to reject an application by the employer to strike out the applicant's claim as having no reasonable prospect of success and the decision to the opposite effect by the tribunal which heard the case. That inconsistency required some explanation. The costs decision was either one reached without regard to the earlier tribunal hearing or it was one which did not sufficiently explain its reasoning, such that it could not stand.

Stubbings v Ministry of Defence; 1 February 2002; EAT/1420/99
EAT: Mr Recorder Langstaff QC, Mr B V Fitzgerald and Mr S M Springer

UNFAIR DISMISSAL

An employment tribunal rejected a claim by an employee, who was a chargehand and health and safety adviser, that he had been unfairly dismissed under section 100(1)(a) of the Employment Rights Act 1996, in that he had been selected for redundancy because of his health and safety activities; but the tribunal found that the employee's dismissal was unfair under section 98(4) in that the employer, when carrying out its redundancy exercise, had assessed the employee simply as a chargehand and failed to give credit for his work as an adviser.

WALL J, allowing an appeal by the employer and dismissing the complaint, said that the employment tribunal's decision had focused substantively on *Smiths Industries Aerospace & Defence Systems v Rawlings* [1996] IRLR 656, where the applicant was an elected health and safety representative. The majority of the tribunal took the view that in so far as dismissal under section 98(4) was concerned that case was not binding on them. They accepted the applicant's argument that it was a case on its particular facts and related specifically to a trade union health and safety representative, who claimed the protection of section 100(1)(b), and did not apply to an adviser, who was protected by section 100(1)(a). There was, however, no reason in principle to distinguish between the protection afforded to persons who came within paragraph (a) of section 100(1) [advisers] and those who came within paragraph (b) [representatives]. The appeal tribunal agreed with the conclusions in *Smiths Industries*. Its conclusion that "the protection against dismissal in a redundancy exercise afforded to health and safety representatives is neutral" applied equally to employees who were advisers within section 100(1)(a). Like those within section 100(1)(b) they must not be disadvantaged by negative discrimination, and equally they were not entitled to be advantaged over their fellow employees in the redundancy selection pool.

e employment tribunal's decision in the present case that there should have been positive crimination was an error of law. The tribunal regarded what it perceived as the failure to exercise sitive discrimination as effectively determinative of the "unfairness" issue under section 98(4). It did t address the statutory criteria within section 98(4)(a) and it undoubtedly substituted its own view of at was fair and unfair rather than considering the question of whether the dismissal lay within the ge of conduct which a reasonable employer could have adopted.

Shipham & Co Ltd v Skinner; 13 December 2001; EAT/840/00
EAT: Wall J, Mr J R Crosby and Mr S M Springer

[2002] ICR Part 5

CONTINUOUS EMPLOYMENT

An employee, whose employment had commenced in 1973, did not return to work after maternit leave in 1990, and, pursuant to her employer's "child break scheme", resigned, while remaining in contac with the employer and working at least two weeks each year, with the promise of re-employment in managerial position on her return. The employee recommenced full-time employment in 1994. In 199 she was made redundant and paid a redundancy payment calculated on the basis that her continuity c employment had been broken by her absence under the scheme. An employment tribunal dismissed he claim for an unlawful deduction of wages.

JUDGE WILKIE QC, allowing an appeal by the employee, said that the employment tribunal had bee right to reject the employee's first argument that throughout the period of the child break scheme he relations with her employer were governed by a contract of employment, because there had been a absence of mutuality of obligation in respect of the provision and performing of work, which was th necessary precondition for a contract of employment. The employee then argued that the scheme was a arrangement by which she was "regarded as continuing in the employment of her employer for an purpose" and so fell within section 212(3)(c) of the Employment Rights Act 1996. That provisio provided that a week not governed by a contract of employment during which an employee was "absen from work in circumstances such that by arrangement or custom he is to be regarded as continuing in th employment of his employer for any purpose" counted in computing an employee's period of employment The majority of the appeal tribunal had concluded that the child break scheme did, as a matter of law amount to an arrangement which fell within section 212(3)(c). The starting point was that sectio 212(3)(c) only bit where there was no contract of employment in existence. Thus, the fact that the employee had been required to, and had, resigned and suffered all the incidents of the cessation of her contract of employment was not determinative. One had to look at the terms of the agreement as the primary source of evidence as to what the parties regarded as the position during the period when it was envisaged there would be no contract of employment in existence. It was clear, in the view of the majority that the parties envisaged that there would be some relationship between them during that period. The employee was to keep her hand in by working at least two weeks a year. She was not to seek alternative employment without consulting the employer. She was to have a line or personnel manager allotted to her. That set of arrangements clearly had a purpose, namely, to facilitate the smooth re-engagement of the employee in to a management role at the conclusion of the break. Those manifestations of continuing obligations and contacts could only sensibly be described as continuing the employment relationship.

Curr v Marks & Spencer plc; 6 March 2002; EAT/1284/00
EAT: Judge Wilkie QC, Mr D A C Lambert and Mr K M Young

DISCIPLINARY PROCEEDINGS

An employee was disciplined for circulating a letter containing his grievances about his employers' staff and practices. A memo from the employers to the disciplinary panel stated that it was the employers' view that the employee's action constituted gross misconduct. The applicant was dismissed and made a complaint of unfair dismissal on the ground that he had not had a fair hearing. The employment tribunal dismissed the complaint.

JUDGE PUGSLEY, allowing an appeal by the employee, said that at the preliminary hearing of the appeal it had been submitted that the memo was bound to prejudice the minds of the employees conducting the disciplinary hearing and that the likelihood of the employee getting a fair hearing was very uncertain. The appeal tribunal was uncomfortable with equating the question of judicial bias with the conduct of a disciplinary hearing. There would be many cases involving small employers when it would be wholly unrealistic to expect that the person making the decision to dismiss would be unaware of many of the details of the case and would not have close relations with, and knowledge of, the person involved. The tribunal should be guided by *Bentley Engineering Co Ltd v Mistry* [1979] ICR 47, where Slynn J had quoted with approval the words of Harman J in *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762, 784: ". . . the person accused should know the nature of the accusation made . . . he should be given an opportunity to state his case; and . . . the tribunal should act in good faith . . ." Slynn J had refined that by saying that natural justice required not merely that a man should have a chance to state his own case in detail but he must know in one way or another sufficiently what was said against him. In the context of disciplinary proceedings in employment it would be quite wrong to lay down formalistic rules that would disqualify a range of persons from taking any part in the decision to dismiss or uphold that decision on an appeal hearing. The procedure to be adopted and the persons appropriate to make the decision to dismiss and hear any appeal against that decision would vary with the nature of the undertaking and the complexity of the issues involved. The sense of fairness of an employment tribunal, including as it did members with experience of both sides of industry, was a sufficient bulwark against unfairness in the rkplace. The appeal tribunal was, however, concerned at the failure of the employment tribunal to deal th the notes of guidance given to the disciplinary panel in the employers' memo. The letter circulated by employee was redolent of the reaction of someone who felt a sense of injustice without having the phistication to express that injustice in appropriate and suitably emollient terms. The tribunal's reasons ked any recognition that, having taken careful steps to ensure that the panel should be free from bias, the mo then appeared to pre-empt the most crucial decision, namely, whether circulation of the letter was act of gross misconduct. It was not that the memo inevitably tarnished the decision to dismiss, so that y such dismissal must be unfair, but that, given the factual background, the memo raised serious issues ich demanded the tribunal's scrutiny and appropriate findings. That was an issue that went to the very art of the decision of fairness. The only way to deal with the matter was to direct a rehearing before other tribunal.

Caredda v London Goodenough Trust for Overseas Graduates; 16 January 2002; EAT/843/00
EAT: Judge Pugsley, Mr K Edmondson and Mrs R A Vickers

OLIDAY PAY

An employment tribunal awarded an employee £277 in respect of arrears of accrued holiday pay titlement, based on a calculation of the daily rate of pay arrived at by taking as the relevant number of ys the 233 working days in a year.

JUDGE WILKIE QC, dismissing an appeal by the employer on the preliminary hearing, said that the ployer argued that the appropriate number of days in a year for the calculation of the daily amount of y was 365 days. In *Thames Water Utilities v Reynolds* [1996] IRLR 186 the Employment Appeal ibunal concluded that "day-to-day" in section 2 of the Apportionment Act 1870 meant calendar days d not working days. On the face of it, therefore, it might be thought that the present appeal had an guable prospect of success. It was, however, the strong view of the lay majority of the appeal tribunal at such an approach was at odds with the virtually universal practice in industry in respect of the lculation of pay in respect of accrued holiday entitlement, which was by reference to a day's work rather an calendar days per year. Furthermore, the *Thames Water* case predated the Working Time Regulations 98, which provided the paradigm for provisions in respect of periods of leave. Reference was made in ragraph 16 of the Regulations to sections 221 to 224 of the Employment Rights Act 1996 which were ncerned, among other things, with the calculation of a week's pay, and it was noticeable that all of those ovisions took as their working assumption the hours actually required to be worked, not the number of urs in a 24-hour day or a seven-day week. Accordingly, it seemed that in the particular context the ncept of day-to-day accrual for the purposes of calculating payment for accrued holiday entitlement ust be by reference to the number of working days in the year and not the number of calendar days in the ar.

Leisure Leagues UK Ltd v Maconnachie; 14 March 2002; EAT/940/01
EAT: Judge Wilkie QC, Ms J Drake and Mr R N Straker
Reporter's note. See also *Taylor v Lowe*, 20 July 2000, EAT/128/99; Recent Points [2000] ICR Part 8.

ACTICE

An employment tribunal dismissed an employee's complaint of unfair dismissal, pursuant to rule 9(3) the Employment Tribunals Rules of Procedure 1993, when neither the applicant nor his solicitor had peared nearly an hour after the hearing was due to commence. The solicitor had phoned the tribunal at morning to say that he was unwell and unable to attend and that he would send a fax later, but no fax d been received. The applicant himself later explained that he had mistakenly attended at the nployment Appeal Tribunal and when he arrived at the employment tribunal his case had been struck t.

JUDGE PUGSLEY, allowing an appeal by the applicant, said that it would have been sensible for the plicant's solicitor to seek a review of the tribunal's decision and to give his explanation for the non pearance of himself and his client at the first opportunity. The failure of litigants to appear at the time d place required was a justifiable source of judicial irritation, but the appeal tribunal was concerned that employment tribunal had acted in a peremptory manner in dismissing the case when they had had tice that the applicant's representative was unwell. The tribunal could have adopted the simple and nsible expedient of adjourning the case for the applicant to show cause why it should not be struck out want of prosecution. If a solicitor, or any responsible person, informed a tribunal that they were capacitated through illness, that explanation should not be rejected without clear and cogent reasons. It s not a proper exercise of the judicial discretion to strike out a case for non appearance when the licitor had telephoned to say that he was not fit to attend; and the failure of the applicant's solicitor to nfirm that by fax had to be seen in the context of the options available to someone who was capacitated. The case would be remitted for the employment tribunal to review its decision to strike out.

Adebayo-Orebote v Sureway Parking Services Ltd; 7 December 2001; EAT/1242/00
EAT: Judge Pugsley, Lord Davies of Coity and Mr B M Warman

RELEVANT EMPLOYEE

When an employer sought to implement a new shift system its warehouse operatives went on strike. A the operatives were subsequently dismissed, apart from W who had not worked for five months because ill-health. Complaints of unfair dismissal by the operatives were dismissed by an employment tribunal c the ground that they were taking part in a strike and had failed to show, for the purposes of section 238(of the Trade Union and Labour Relations (Consolidation) Act 1992, that one or more relevant employe had not been dismissed.

HOLLAND J, dismissing an appeal by the applicant operatives, said that the applicants had submitte that W, who had not been dismissed, was a "relevant" employee, since, although he had not been physicall present at work at the time, he had voted for strike action in the union ballot and should be taken to hav been "taking part in the action" within the meaning of section 238(3)(b). It was said that the employmen tribunal had misdirected itself: the issue was not whether W was "on strike" but whether he was takin part in a strike or other industrial action, which activity was less specific. Criticisms of the reasons wer justified. Granted that economy of expression was a virtue, the terse directions as to law were arguabl inapposite at worst, opaque at best, and the findings of fact, hopefully, did not do justice to the review of a the circumstances. But, that said, there was a decision on the facts and, given the patent absence c "exceptional circumstances" as identified in *Hindle Gears Ltd v McGinty* [1985] ICR 111, 118D, not onl was there no basis on which it could be attacked as perverse, it was arguably the only one open to th tribunal when all the circumstances were taken into account. The lay members of the appeal tribuna wished to emphasise that a section 238 issue was rarely easy and called for careful factual analysis whic should be apparent from the reasons. The appeal tribunal were satisfied, however, that, in the particula circumstances of the case, any misdirection as to law did not impugn the findings of fact.

Pointon v BBA Friction Ltd; 12 April 2002; EAT/1380/00
EAT: Holland J, Mr P R A Jacques and Mr J Rivers

WAGES

An employment tribunal chairman dismissed claims by employees, under section 23 of the Employment Rights Act 1996, to be paid travelling expenses between home and work for attendance outside their normal working hours, on the ground that such expenses were incurred "in carrying out [their] employment" within the meaning of section 27(2)(b) of the Act and as such excluded from the definition of wages in section 27.

MAURICE KAY J, dismissing an appeal by the employees, said that the employment tribunal chairman had been referred to *Barrie v Rochdale Metropolitan Borough Council* (unreported) 5 May 1995 and *Southwark London Borough Council v O'Brien* [1996] IRLR 420. There was a passage in *Barrie* that seemed to come very close indeed to the circumstances of the present case, and though the employees had sought to distinguish that case on the basis that there the principal argument was as to whether there was a profit element in the expenses, that was not an important point of distinction. *Barrie* had been cited with approval by Mummery J, in giving judgment in *O'Brien's* case, where he said, at p 423: "We agree . . . that in a case such as this a finding has to be made that the deduction was either wholly in respect of wages or wholly in respect of expenses. What it is in each case is a matter of fact and degree." The appeal tribunal had not found the present case to be simple, not least because in section 27(1) and (2) two different forms of expression were used, namely, "in connection with his employment" and "in carrying out his employment". But, having regard to all the circumstances, and in particular that *Barrie* had remained uncriticised for more than five years, notwithstanding any difficulties in interpretation, *Barrie* ought to be followed and the conclusion of the tribunal chairman upheld. Section 27(2)(b) embraced the assumed facts of the present case involving the common feature of travel between home and workplace. In the last resort, it mattered not whether that was correctly described as a matter of jurisdiction; the question was whether the facts fitted the section. There was another matter worthy of note. In *O'Brien's* case Mummery J expressed the view that it was preferable for cases under Part II of the 1996 Act to be heard by a chairman sitting with lay members, rather than alone. In the present case, ultimately the chairman had only been called on to decide a narrow point of construction on assumed facts, but that might not have been his only task. It did nothing to invalidate his decision and the parties had agreed to that course, but the mere agreement of the parties was something which Mummery J had suggested ought not to be conclusive as to the constitution of the tribunal; and the present appeal tribunal would associate themselves with his comments.

Wildgoose v Rampton Hospital Authority; 17 December 2001; EAT/977/00
EAT: Maurice Kay J, Miss A Mackie and Mr P R A Jacques

PPEAL

An applicant applied for an order striking out the respondents' notice of appearance on the ground of eir scandalous behaviour in conducting the proceedings in that an application by the respondents for an ljournment of the hearing, which had been granted by the employment tribunal, had been made in bad ith. The employment tribunal found that there had been no deliberate intention to deceive or mislead the ibunal and dismissed the application to strike out.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that notes of evidence given by the spondents' solicitors, if accurate, raised the gravest doubts about the veracity of an explanation given to e employment tribunal by the solicitors in correspondence with the employment tribunal, and, having lled in to question the reliability and veracity of the sources of evidence on a crucial issue, plainly the true isis of the respondents' earlier letter of application for an adjournment was called in to question. If the mit of the appeal tribunal had enabled it to interfere with findings of fact or to consider whether the nployment tribunal had misunderstood or misapplied the facts, then the appeal tribunal might well have een persuaded that the employment tribunal's decision should not stand. However, the powers of the ppeal tribunal were severely constrained; it could only uphold an appeal on a point of law, and what nounted to a point of law was equally well established. In *British Telecommunications plc v Sheridan* 990] IRLR 27 the Court of Appeal had identified the bases on which the appeal tribunal could interfere ith the decision of an employment tribunal. It could do so if it was satisfied that the tribunal had isdirected itself as to applicable law, or if there was no evidence to support a particular finding of fact, or the decision was perverse in the sense explained by May LJ in *Neale v Hereford and Worcester County ouncil* [1986] ICR 471. But misunderstanding or misapplication of the facts was not a separate category which the appeal tribunal could allow an appeal if it took a different view of the facts from the nployment tribunal. To the extent that any earlier authorities identified that as a separate basis for lowing an appeal, they should not be followed. There was no question of the tribunal in the present case ving misdirected itself as to the law, there was ample evidence to support its conclusions of fact and, ving regard to the totality of the evidence, the appeal tribunal could not say "My goodness, they have got at wrong." What there was was a body of evidence, both written and oral, which pointed in a certain rection and there was, equally, a passage of evidence, fairly short, but to the point, which appeared to int in the opposite direction.

Lewin v North East London Probation Service; 1 March 2002; EAT/1123/01
EAT: Judge Wilkie QC, Mr D A C Lambert and Miss A Mackie

OMPENSATION

An employment tribunal assessed compensation for race discrimination on the basis that, on the lance of probabilities, the applicant employee would have returned to work for the employers had the nployers approached matters differently, and it compensated her for the totality of her loss of earnings om the termination of her employment until a date, beyond the remedies hearing, by which time she ould have been able to find other work.

JUDGE WILKIE QC, allowing an appeal by the employers, said that the employers argued that the bunal had made a fundamental error of approach: it was not concerned with making a finding of fact as what had already happened but with carrying out an assessment of what might have happened had the nployers acted in an appropriate way. It was said that that normally would involve a percentage sessment, which in an appropriate case might be 100%. The tribunal had expressed itself clearly. It had ade a finding of fact on the balance of probabilities. But it was equally clear that where one was assessing e chance of something happening in the future that was not the appropriate approach and some different proach, demonstrating that the process was one of assessing a chance, was necessary. The case would be mitted to a different tribunal on the question of remedy.

Ministry of Defence v Moitra; 12 February 2002; EAT/1512/00
EAT: Judge Wilkie QC, Dr D Grieves and Mr R Sanderson

OMPENSATORY AWARD

Following a decision that an applicant employee had been unfairly dismissed, an employment tribunal und that the employee had been out of work for four weeks and calculated the basic and compensatory vards by taking the employee's gross weekly pay as £120 for a 63·5 hour week and making an allowance respect of the compensatory award of £50 per week for loss of free accommodation.

JUDGE PETER CLARK, allowing an appeal by the employee against the calculation of the awards and mitting that matter to a different tribunal, said that where it was contended that an employee was paid less than the national minimum wage that was a matter which had to be investigated by the employmen tribunal when assessing both the basic and compensatory awards for determining the proper level o compensation recoverable for unfair dismissal. It was no answer that the employee had made no clai under the minimum wage legalisation per se. The inquiry should be added to the list of issues properl arising for consideration by the tribunal set out in *Langston v Cranfield University* [1998] IRLR 172. B section 17 of the National Minimum Wage Act 1998 a worker who was paid less than the statutor minimum had to be taken as entitled to be paid under his contract the difference between what he was pai and the amount of his entitlement under the Act. Section 49(1) prohibited contracting out of the statutor right to be paid the minimum wage. It followed that the calculation of a week's pay for the purposes o section 221(2) of the Employment Rights Act 1996 was subject to the statutory minimum wage. In so fa as the employee's actual gross wage fell below the statutory minimum the higher figure had to be used i calculating a week's pay. Having calculated the employee's gross weekly pay in accordance with th national minimum wage, that sum had to be reduced by the notional tax and National Insuranc deductions to provide the net wage. There had been no investigation by the employment tribunal as to th minimum wage to which the employee was entitled. A further complication was the free accommodatio provided by the employer. Whereas the provision of free accommodation did not go to reduce th statutory minimum wage for the purpose of calculating a week's pay in the context of a basic award, i assessing the compensatory award there would be an element of double recovery if no account was take of the notional value of the accommodation in the net weekly wage based on the national minimum wage Applying the just and equitable principle in section 123(1) of the 1996 Act, the matter should b approached by calculating the gross pay by reference to the actual hours worked multiplied by th statutory minimum wage, deducting the maximum weekly allowance for accommodation (£19·95 provided for in regulation 36 of the National Minimum Wage Regulations 1999, and netting down th result to allow for tax and National Insurance contributions to give the multiplier for the purpose o calculating the loss of earnings over the four-week period. In addition the employee was entitled to th actual value to him of the loss of accommodation, assessed by the tribunal at £50 per week.

Paggetti v Cobb; 22 March 2002; EAT/136/01
EAT: Judge Peter Clark, Ms J Drake and Mr K M Young

HOLIDAY PAY

Under his contract of employment, an employee's remuneration comprised his basic salary plus commission in relation to contracts sold to clients in respect of which 25% of the fee had been paid, and he was entitled to holiday pay at his normal basic rate. An employment tribunal rejected a claim by the employee that, by failing to include commission payable in the calculation of a week's pay for the purposes of regulation 16 of the Working Time Regulations 1998, the employers had made an unauthorised deduction from his wages.

JUDGE WILKIE QC, allowing an appeal by the employee, said that, applying section 221(1)(2)(3) of the Employment Rights Act 1996, the employee's employment was one where there was a normal number of working hours and the amount of work done in the period of normal working hours did not vary, in the sense that payment was not based on the amount of work done, rather that payment of commission was based on the outcome of that work. Therefore, one would have thought that, on the natural meaning of those subsections, commission would not be included as part of payment and the averaging out provisions of subsection (3) would not apply. However, section 221(4), which provided that references to remuneration varying with the amount of work done included remuneration which might include commission, had the effect of overriding the normal meaning of subsection (3) so that an employee, who received payment by way of commission which was not payment by reference to the amount of work done but payment by reference to the varying result of work done, was provided for by subsection (3) rather than subsection (2). It followed that, in rejecting the employee's argument that he was entitled to holiday pay calculated by reference to the previous 12 weeks' actual earnings of normal basic pay plus commission, the tribunal had erred in law. In respect of accrued holiday pay entitlement he was entitled to have that payment calculated by reference to the statutory formulation in section 221(3).

Evans v The Malley Organisation Ltd (t/a First Business Support); 19 February 2002; EAT/99/01
EAT: Judge Wilkie QC, Mr B Gibbs and Ms H Pitcher

PRACTICE

On an employee's complaint, inter alia, that his employer had failed to make to him payments under six heads, the employment tribunal's reasons stated that the employer accepted the applicant's claims for four of the heads of claim and that the parties had asked the tribunal not to consider them, and the tribunal ruled only on the two remaining heads.

MR RECORDER BURKE QC, allowing an appeal by the employee, said that the employer had decided not to appear at the appeal hearing. At no point was it suggested in either the tribunal's reasons or e chairman's notes that the four individual contract claims were to be withdrawn and the tribunal cision itself did not say anything about them. If there had been an agreement between the parties as to ose four heads of claim, the tribunal could have either given effect to it by deciding that the heads of claim ere withdrawn on agreement or by awarding by consent the sums agreed. If there was no agreement, erely a concession by the employer, the tribunal would have been expected to have made an order in vour of the applicant for the sums conceded. The tribunal did not take any of those courses, and thereby red in law, because it was bound to make a decision in one form or another, though the tribunal was not nolly to blame, since the parties, through their representatives, ought to have made clear to the tribunal hat order they were seeking. Since it was not certain what precisely had happened between the parties, ere was no sensible alternative to the matter being remitted to the employment tribunal so that it could solve between the parties what orders should be made. Counsel for the employee had put the case on an ternative basis. She submitted that in a letter from the employee's solicitors to the tribunal a request had en made for a review of their decision, at which review matters could have been put right. The tribunal d written that the parties had asked them not to consider the four heads of claim and they could not corporate in to their decision matters which the parties had asked them not to consider. Counsel said at was a refusal of an application for a review. The solicitors' letter, however, did not amount to an plication for a review. It was in fact a request to the tribunal to insert in to the original decision an award amounts in relation to the four heads of claim which had not been dealt with at the hearing.

Gooden v Ritz Country 1035 Ltd; 31 January 2002; EAT/1469/00
EAT: Mr Recorder Burke QC, Miss C Holroyd and Mr R Thomson

EVIEW

An applicant reached an agreement through Acas with the respondent to his claim of wrongful smissal. Though Acas asserted that they had informed the employment tribunal of the agreement and at, accordingly, there was no need for a hearing, the tribunal denied that they had been so informed, and the day fixed, when neither party attended, the chairman dismissed the applicant's claim. The chairman fused an application by the applicant for a review on the ground that it had no reasonable prospect of ccess, commenting that, as the applicant had no doubt received the payment agreed, the interests of stice did not require a review.

MR RECORDER BURKE QC, allowing an appeal by the applicant, said that the respondent had ritten to say that it did not oppose the appeal. The chairman's failure to allow a review was an error of w. It was not a decision which, on the facts, could reasonably have been reached. There was a real fference between a decision on the register dismissing the claim on the basis that it had failed and a cision that the claim had been withdrawn, the parties having reached an agreement. The difference was ot trivial and the applicant was entitled to have the decision expressed in terms that reflected what had ally happened and not what the chairman had originally thought had happened, though through no fault his own he had not been informed of the true situation. No one would have been prejudiced by the placement of the order with an order in the terms suggested. It was possible that the chairman could have nply corrected the error under the slip rule: rule 10(9) of the Employment Tribunals Rules of Procedure 93. That seemed the easiest and most sensible course for the appeal tribunal to take and it would, erefore, be directed that the register be amended so as to substitute for the decision that the application iled and was dismissed an order that it was dismissed on withdrawal by agreement of the parties.

Davoren v London Fire Protection Services; 31 January 2002; EAT/1433/00
EAT: Mr Recorder Burke QC, Miss C Holroyd and Mr T C Thomas

AGES

An employee had taken 15 days of her 20-day annual leave entitlement when she left her employment ter six months of the leave year. An employment tribunal chairman upheld her claim for unpaid wages t deducted five days' overpaid holiday pay.

JUDGE PETER CLARK, allowing an appeal by the employee, said that, where a worker's employment rminated during the course of a leave year and at the date of termination she had taken more leave oportionately than she was entitled to in that year, the position was governed by regulation 14(4) of the orking Time Regulations 1998, which provided that a relevant agreement might provide that in such rcumstances the worker should compensate the employer. It was common ground that no relevant reement had been entered into by the parties in the present case. The position was that the employee was titled to and had received wages for the 15 days' holiday taken during her employment. Credit for the e extra days' holiday pay would only arise where there was express provision in a relevant agreement. In ose circumstances an exception was made under section 13(1) of the Employment Rights Act 1996; the duction of excess holiday pay from the final wage entitlement being authorised by the employment ntract or previously agreed or consented to in writing. Section 14(1) of the 1996 Act was immaterial, whether or not there was a relevant agreement, as there was no “overpayment” of holiday pay. T employee was entitled to paid holiday, up to 20 days per year, under regulation 16(1).

Hill v Chapell; 20 March 2002; EAT/1250/01
EAT: Judge Peter Clark, Mr J Hougham and Mr P R A Jacques

ISABILITY COMPENSATION

An employee, who had been dismissed in breach of the employers' procedures in April 1999 after being ff work for a number of months suffering from irritable bowel syndrome developed as a result of being ullied at work, was reinstated and transferred to work which, though physically appropriate, did not ddress the underlying psychological problem. In November 1999 he was dismissed on grounds of ill-ealth capability. An employment tribunal upheld the employee's complaint of disability discrimination nder section 5(1) of the Disability Discrimination Act 1995, finding that, since the employers had made o attempt to determine what adjustments might be made to enable the employee to work for them, they ould not raise a defence of justification under section 5(1)(b). The tribunal awarded £2000 for injury to eelings but nothing for loss of earnings following the second dismissal on the ground that by November 999 the employee had formed a view that the employers were not to be trusted and, accordingly, he would ot have taken up any other job with them.

JUDGE PETER CLARK, allowing an appeal by the employee against the amount of the award, said hat, in declining to make any award for lost earnings consequent on the unlawfully discriminatory ismissal and in limiting the award for injury to feelings to the final act of dismissal, the tribunal had failed o apply the tortious principles referred to in section 8(3) of the 1995 Act. It was clear that the employee ad lost confidence as a result of what might properly be described as the discriminatory treatment ulminating in his dismissal. Though there had been no complaint under section 5(2) of the Act, that did ot render any failure by the employers to make reasonable adjustments immaterial to the complaint under ection 5(1). The employee's eventual loss of confidence was related to, not independent of, the iscrimination under section 5(1), itself rendered unlawful in part by the failure to make reasonable djustments by virtue of section 5(5). It was thus material to the assessment of loss flowing from the tatutory tort. The correct approach to the question of loss under section 8(3) was to ask what were the hances, if the employer had complied with his statutory duty under the Act, that the employee would have etained his employment. In the present case, that depended on a combination of a finding as to the proper djustment to be made and a finding on medical evidence as to whether the employee would have ecovered sufficiently to take up an alternative post. Further, the employment tribunal had artificially estricted compensation for injury to feelings to the single act of the second dismissal. It was for the ribunal to assess the effect of the employers' actions related to their treatment of the employee's disability hich culminated in the unlawful act, i e the final dismissal.

Wight v East Riding of Yorkshire Council; 18 April 2002; EAT/101/01
EAT: Judge Peter Clark, Mr J R Crosby and Mr P R A Jacques

FFECTIVE DATE OF TERMINATION

An employment tribunal held that, where an employee had presented an originating application omplaining of unfair dismissal before the employers were aware that he had resigned from his mployment, the effective date of termination of his employment was the date the application was resented to the tribunal, and ruled that the application had been duly presented before the end of the eriod of three months beginning with the effective date of termination as required by section 111(2) of the mployment Rights Act 1996.

LORD JOHNSTON, allowing an appeal by the employers, said that the employers submitted that, for here to be an effective date of termination of a contract by resignation, the resignation had to be intimated o the employer by the employee, at least to the extent that the employer would thus become aware of the mployee's position. It was said, therefore, that the earliest date to be regarded as the effective date of rmination would be four days after the presentation of the originating application when the employers eceived a letter of resignation from the employee; and that the application had been presented before the hree-month period began. Given the decision in *Edwards v Surrey Police* (Recent Points [1999] ICR Part), the employment tribunal's decision that the effective date of termination was the date when the pplication was presented was plainly wrong because no intimation of the resignation had been given to he employers at that time. It followed that the effective date of termination was the date of the employee's tter. The issue then was whether the time period specified in section 111(2) was a closed period beginning ith the date of termination or whether all that mattered was that the application was presented at some age before the expiry of three months from the date of termination which could be any time before that ate. It was plainly Parliament's intention only to open jurisdiction once there had been an effective date of rmination. To hold otherwise would admit an open-ended period as far as the beginning was concerned nd that flew in the face of the language of the subsection. To be competent an application claiming unfair smissal had to be lodged with the tribunal within the period of three months beginning with the effective date of termination. In the present case that had not been done since it had been lodged before the effective date of termination and the tribunal had no jurisdiction to hear the complaint.

Stagecoach in Fife v Higgins; 28 February 2002; EAT/1127/01
EAT(Sc): Lord Johnston, Mr A J Ramsden and Dr W M Spiers

EQUAL PAY

An employment tribunal struck out an applicant employee's equal pay claim in respect of like work as frivolous, as having no prospect of success, on the ground that any meaningful comparison as to the chosen comparators doing like work to the applicant had ceased more than six years before the presentation of the originating application.

LINDSAY J, allowing an appeal by the applicant, said that the use of the present tense in section 1(2)(a) and (4) of the Equal Pay Act 1970 had given rise to an argument that the comparison required by the Act was one between a man and a woman contemporaneously in the same employment and doing like work, but such a construction would have conflicted with the broad purpose of article 119 (now article 141 EC) of the EC Treaty, which required each member state to give effect to the principle of equal pay for male and female workers for equal work or work of equal value. In *Macarthys Ltd v Smith* (Case 129/70) [1980] ICR 672, 690, para 11, the view that contemporaneity was not required was upheld by the Court of Justice. The appeal tribunal could see no source for the six-year comparator bar. There was no formal rule of law that only the circumstances attendant on a chosen comparator in the period of six years before the presentation of an originating application could be relied on as a matter of effective comparison by an applicant. The six-year comparator bar was not a requirement of law. The applicant's union were right to argue that the six-year rule applied only to the period for which compensation could be sought and not to the period of the events with which comparison could be made. While the applicant's reliance on comparison with the comparators at distant times would be likely to put considerable difficulties in her way, they were difficulties of fact not law and needed to be resolved on the evidence. The tribunal had erred in law, as, instead of looking in to the evidence, it had felt able to dispense with such inquiry and rule on the issue as if it was one of law, one of frivolity and fitness for a striking out.

Kells v Pilkington plc; 2 May 2002; EAT/1435/00
EAT: Lindsay J, Mr P Dawson and Mrs D M Palmer

PRACTICE

In proceedings by applicant employees complaining that they had been unfairly dismissed, the respondent employers applied for an order requiring the applicants to retain different solicitors from the firm representing them on the ground that, that firm having recently acted for the respondent, there was a conflict of interest which affected the respondent's right to a fair hearing under article 6 of the European Convention on Human Rights. The employment tribunal chairman, applying *Bache v Essex County Council* [2000] ICR 313, refused the application.

WALL J, dismissing an appeal by the respondent, said that the respondent argued that the chairman had erred in holding that section 6(1) of the Employment Tribunals Act 1996 rendered the tribunal powerless to order a party's solicitor to cease to act where there was a conflict of interest, given the overriding objective under regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 and the tribunal's powers under rules 4 and 11 of the Rules of Procedure. It was said that *Bache* was distinguishable; that its effect was merely that a tribunal could not compel a party to be unrepresented. The applicants submitted that the employment tribunal, and the appeal tribunal, which were creatures of statute, had no power to prevent a representative chosen by a party from acting for that party. Though, at first blush, when section 6 was considered in the context of article 6 of the Convention, that appeared a somewhat startling proposition, the appeal tribunal were satisfied that it was sound, that *Bache* applied and that there was no error in the chairman's ruling. The right to a fair hearing under article 6 did not require section 6 to be read as though it enabled the tribunal to require a party to dispense with his chosen representative. *Bache* established a very important point of principle and was binding. The existence of any power to interfere with representation before the employment tribunal would require clear statutory authority, and that was not provided either by the Human Rights Act 1998 or the introduction of the overriding objective. In any event, considering the matter on its merits, neither the applicants nor their solicitors took the view that there was a conflict of interest, and the solicitors had, furthermore, sought advice on the propriety of continuing to act from the professional ethics department of the Law Society and also asserted that they had acquired no confidential information relating to the respondent. The appeal failed both on the issue of principle and on the merits.

Dispatch Management Services (UK) Ltd v Douglas; 4 December 2001; EAT/902/01
EAT: Wall J, Mrs D M Palmer and Mr G H Wright

ACE DISCRIMINATION

An applicant complained that the Prison Service had discriminated against him on racial grounds, inter ia, when he failed an assessment test, taken with a view to his becoming a prison officer. The nployment tribunal concluded that the applicant had been unable to demonstrate that S, a candidate of a fferent race to the applicant, did not meet the standards required and that there was no evidence that the pplicant had been treated any differently to S; and it dismissed the complaint.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that the applicant submitted that the ibunal's decision did not pose, specifically, the relevant questions and, by failing to do so, the tribunal had llen into error in failing to consider, as a comparison exercise, the position of a hypothetical comparator. n the face of it, the respondent accepted that, the applicant's case being presented on the basis of an tual comparator, S, the tribunal, in its process of reasoning, had not had regard to any hypothetical mparator. The applicant relied on *Lindsay v Alliance & Leicester plc* [2000] ICR 1234 and two nreported decisions of the Employment Appeal Tribunal: *Hackney London Borough Council v Fashola* 2 January 1996) and *Jarman v Stenning*. In each of those cases, however, it seemed clear that the quirement was to look at the hypothetical comparator as an alternative to looking at a real comparator, ich that, if there was a real true comparator with whom a comparison might be made, and the tribunal ade that comparison, it was not then obliged to construct a hypothetical comparator. The logic of that emed clear, and it was hard to see how any sensible construction of a hypothetical comparator could lead any different result than arose from the comparison with the true comparator. *Balamoody v United ingdom Central Council for Nursing Midwifery and Health Visiting* [2002] ICR 646, where there was no ue comparator, did not assist the applicant's contention that where there was a true comparator there as a further duty to construct a hypothetical comparator. That submission was rejected. S had been put rward as a true comparator, in so far as it was his performance on the assessment exercise that was being mpared with that of the applicant, and the tribunal had accepted his example as a true comparison. ven if there was an obligation to construct a hypothetical comparator, the way in which the tribunal had plained itself satisfied that requirement.

Williams v Prison Service; 7 February 2002; EAT/1236/00
EAT: Judge Wilkie QC, Ms S R Corby and Dr D Grieves

EX DISCRIMINATION

An employment tribunal rejected a claim by a pregnant employee that she had been discriminated gainst by her employer contrary to the Sex Discrimination Act 1975 on the ground that, although the nployer had failed to make a risk assessment in breach of regulation 16(1)(b) of the Management of ealth and Safety Regulations 1999, the employee had not been treated less favourably than a man or non-regnant woman in that the employer would not have undertaken a risk assessment for any of her nployees.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that *Day v T Pickles Farms Ltd* ecent Points [1999] ICR Part 7) clearly indicated that a failure to carry out a risk assessment could be a etriment within the meaning of the Sex Discrimination Act 1975. The employment tribunal were bound that judgment and ought to have applied it. In the extended reasons the tribunal said that they were eing asked to widen the definition of discrimination to encompass a failure of an employer to treat a oman more favourably than a man. The proper approach was to construe the 1975 Act by reference to e Equal Treatment Directive 76/201/EEC and the Pregnant Workers Directive 92/85/EEC. It was not ecessary for the treatment of the employee by the employer to be compared with the employer's treatment a comparable male employee or non-pregnant female employee: see *Webb v Emo Air Cargo (UK) Ltd No 2)* [1995] ICR 1021. If the basis of the treatment was pregnancy, it was unlawful, irrespective of the nployer's comparable treatment of men, or non-pregnant women. The proper approach in construing eatment was to consider not just dismissal but working conditions. The protection of a woman's ological condition during and after pregnancy indicated a special relationship which had to be protected. ne way in which it was protected was by carrying out a risk assessment pursuant to the 1999 Regulations. ilure to do so impacted disparately on pregnant workers and was discrimination. The employment ibunal had erred in their approach to the application of the 1975 Act. They had failed to construe it so as give effect to the Pregnant Workers Directive and to apply the 1999 Regulations to the allegation of sex scrimination made by the employee.

Hardman v Mallon (trading as Orchard Lodge Nursing Home); 25 March 2002; EAT/360/01
EAT: Judge McMullen QC, Mr D A C Lambert and Miss A Mackie

IME LIMIT

An originating application making a complaint of unfair dismissal, posted to the tribunal a week before e expiry of the three-month time limit in section 111 of the Employment Rights Act 1996, did not arrive til a month later. The employment tribunal, ruling that it had no jurisdiction to hear the complaint der section 111(2), found that, had the application been received in the normal course of the post, it would have been presented in time, but that, as there had been only a few days to the expiry date when i was posted, the applicant ought to have checked with the tribunal office that it had arrived, and that it had been reasonably practicable for the application to have been presented in time.

JUDGE WILKIE QC, allowing an appeal by the applicant, said that, on the authorities, there was a world of difference between a case in which an applicant acting in person submitted an application in good time—so that in the normal course of post it would be received in time and no alarm bells rang when the tribunal, as in the present case, took several weeks to acknowledge its receipt—and the case where an applicant acted through solicitors, whose professional duty encompassed having in place systems to aler them when applications, sent in good time, were not acknowledged as having been received in what they knew to be the normal course of business. The employment tribunal had failed to have regard to the fac that, in the present case, the applicant was acting in person, not represented by solicitors, and, as a consequence of that, it had applied a test of prudence appropriate to solicitors. The tribunal had failed to pose the question which would frequently be, and in the present case was, highly relevant, namely, whether the fact that the application had not arrived in time was substantially the fault of the applicant. A person acting without the benefit of legal advice was entitled to assume that a document would arrive in the normal course of the post. It would be an unreasonable imposition on such an applicant to require her to contact the tribunal office. In the present case the three weeks or so delay was reasonable, and there was no prejudice to the respondent in the appeal tribunal deciding that the employment tribunal did have jurisdiction to determine the applicant's complaint.

Grossman v Barnet Healthcare; 22 February 2002; EAT/134/01
EAT: Judge Wilkie QC, Mr T C Thomas and Mr N D Willis

OMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal on the ground that the nployers had not sufficiently investigated the employee's misconduct. Without affording counsel the pportunity to make submissions on contributory conduct, the tribunal went on to hold that the nployee's compensation should be reduced by 75% on the basis that there was only a 25% chance that he ould not have been dismissed had the dismissal been procedurally correct.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employers, said that it was an ementary principle of law and procedure, sometimes referred to as a principle of natural justice, that each arty had a right to be heard. Part of that principle necessarily involved a party having the opportunity ithin reason to address the tribunal on the issues before it. Where a tribunal reached a decision on a iscrete issue without giving the opportunity to either party to address that issue, there would be a failure f natural justice. If the judgment that had to be made to establish the percentage was to be regarded as a parate legal issue, it was not one which the parties had been invited to address. If, however, it was to be garded not as a discrete legal issue but as part and parcel of the determination of unfairness, then it would ot necessarily be required of the tribunal to ask the parties for their submissions. Essentially, the appeal rned on whether the determination of the "*Polkey* percentage" was a determination of a separate legal sue. It was argued on behalf of the employee that, given that there was an obligation on an employment ibunal to reach a determination as to that percentage and given that the tribunal was equally entitled, as *ing v Eaton Ltd (No 2)* [1998] IRLR 686 demonstrated, in some circumstances at least to refuse to hear rther evidence on that issue, a tribunal was equally entitled not to hear submissions on the evidence it had eard before reaching a determination. That submission was rejected. First, *Polkey v A E Dayton Services td* [1988] ICR 142 itself drew a distinction between procedural fault and the economic consequence in rms of compensation for that fault. Secondly, it was common ground that the tribunal were engaged on a earing as to liability first and were not engaged on any issue related directly to compensation. Counsel for e employee properly conceded that, if the tribunal had come to a conclusion following deliberation as to e amount of compensation to be paid without inviting any further evidence or submissions, there would ave been a clear sense of injustice. The present position was analogous. Further, it was customary for ibunals to invite advocates to make submissions as to the percentage chance in respect of the *Polkey* eduction. That recognised the fact that it was not naturally evident to an advocate that the point arose as eing bound up inextricably with a decision as to the unfairness of the dismissal. Accordingly, where a ibunal had before it a case in which it was considering reaching a decision that a dismissal was unfair on rocedural grounds, then, unless it had given the parties an opportunity to address it as to that aspect of the ase before retiring, it should raise with the parties the possibility that submissions might make a difference the determination before proceeding to place a figure on it. The tribunal was not entitled to resolve an sue in the absence of submissions by the parties where that issue was of fundamental importance to the nount of compensation.

Market Force (UK) Ltd v Hunt; 10 April 2002; EAT/393/01
EAT: Mr Recorder Langstaff QC, Mr W Morris and Ms H Pitcher

MPLOYMENT APPEAL TRIBUNAL

At the preliminary hearing of an appeal by an applicant against the dismissal, by an employment ibunal, of her complaint against a respondent claiming sovereign immunity, the Employment Appeal ribunal formed the view that it was arguable that the provisions of the State Immunity Act 1978 infringed rticle 6 of the European Convention on Human Rights in the circumstances giving rise to the appeal. The ppeal tribunal made an order permitting the appeal to proceed to a full hearing but staying that appeal ending the judgment of the European Court of Human Rights in *Fogarty v United Kingdom* [(2001) 34 HRR 302]. The respondent High Commission, while asserting that there had been no submission to the risdiction, invited the appeal tribunal of its own initiative to review that order and dismiss the appeal, ontending that the appeal was unrelated to the pending decision in *Fogarty* and that by virtue of the ommission's sovereign status the appeal tribunal did not have jurisdiction to make an order allowing the pplicant's appeal to proceed.

MISS RECORDER SLADE QC, declining to review the order, said that on 21 November 2001 the uropean Court of Human Rights held that there had been no violation of article 6(1) of the Convention in *ogarty*, and, as suggested by the High Commission, no doubt to avoid any argument that it had submitted the jurisdiction, the appeal tribunal would consider of its own motion whether its earlier order should be eviewed. The power of the appeal tribunal to review its orders was contained in rule 33 of the mployment Appeal Tribunal Rules 1993 and had been considered in *Blockleys plc v Miller* [1992] CR 749 and *Digital Equipment Ltd v Clements (No 2)* [1997] ICR 237 in which Morison J observed, p 240B, that the appeal tribunal "has no power to hear an appeal against its own decision and should not purport to do so". The High Commission had invited the appeal tribunal to review its earlier decision o the basis of a re-assertion of statutory state immunity and an argument that the judgment in *Fogarty* wa immaterial to the current appeal as Mrs Fogarty's claim was based on an allegation of sex discrimination whereas the applicant's claim was based on an alleged breach of contract. The appeal tribunal was of th view that those arguments invited a rehearing of the preliminary hearing of the appeal; and, on a prope construction of rule 33 in the light of *Blockleys* and *Digital Equipment*, the appeal tribunal was no satisfied that the grounds on which it was invited to exercise its review jurisdiction enabled it to do so.

Onwuemene v Nigerian High Commission; 14 March 2002; EAT/13/01
EAT: Miss Recorder Slade QC, Mrs T A Marsland and Mrs D M Palmer

STRIKING OUT

An employment tribunal chairman struck out an applicant's complaint of sex discrimination afte neither the applicant nor her representatives had attended an interlocutory hearing and he had found i "hard to accept" the representative's explanation that she had entered the wrong date in her diary. The chairman held that, although the originating application did not set out the facts, it was not itself frivolous or vexatious, but that the manner in which the proceedings had been conducted by and on behalf of the applicant had been frivolous or vexatious.

LINDSAY J, allowing an appeal by the applicant, said that there was no event or fact which could have led to the applicant herself being held to have been frivolous or vexatious against the background of the matter being conducted largely, or wholly, by a representative. It would seem that it was the conduct of the representative, therefore, that gave rise to the offending conduct, but the representative's conduct was not to be held to be wilful or contumelious. There was no suggestion of a deliberate abuse of process, nothing by way of behaviour intended to be contemptuous of the court. Though it was not right to draw very close parallels between the position in the High Court and the position in the employment tribunals, what was just in one was likely to be just in the other; equally, what was unjust in one was likely to be unjust in the other. Even before the recent reforms in the High Court it was relatively unusual for a case to be struck out for conduct where there was nothing contumelious about the conduct and where there had been no "unless order". One important consideration seemed not to have loomed at all in the chairman's thinking in his decision to strike out. That was how far the failure of the representative to attend the interlocutory hearing had materially prejudiced a fair trial of the case, it being remembered that the chairman did not find the pleadings themselves to be frivolous or vexatious. He did not say that the representative's reasons for non attendance were not to be believed, but that they were "hard to accept". What he had before him was a case that could not be regarded as one of wilful default or contumelious error on the part of the representatives but simply total incompetence or negligence on their part. The chairman never addressed the question which the appeal tribunal regarded as an important one, namely, whether a fair trial truly was prejudiced by the non attendance. It was an error of law not to address that crucial factor, though that was not to say that it would necessarily have been determinative.

Lee v Police Information Technology Organisation; 18 February 2002; EAT/185/01
EAT: Lindsay J, Mr D A C Lambert and Mr K M Young

UNFAIR DISMISSAL

An employment tribunal held that, by failing to consult the applicant employee or to take steps to determine whether alternative employment was available, the respondent employers had acted unreasonably, in terms of section 98(4) of the Employment Rights Act 1996, when they failed to renew the employee's fixed term contract; and the tribunal upheld the employee's complaint of unfair dismissal.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the employment tribunal had misdirected itself in law in that it did not apply its mind to the test relating to the "band of reasonable responses", and had, in any event, determined, contrary to authority, that a failure to consult automatically rendered a dismissal unfair when related to redundancy. The appeal tribunal was of the opinion that when the issue was one of redundancy, in the sense that the reason for dismissal had been established as such, the test of the band of reasonable responses had no operation. That was an appropriate way to assess the reasonableness of an employer's conduct in the context of misconduct, but, in the context of redundancy, which was a decision made by the employer, there was no factor which required a response. What the statute enjoined the employer to do, having embarked on a redundancy process, was to act fairly and reasonably in carrying out the selection process. Reference had been made to *Chronos Richardson Ltd v Watson* (Recent Points [2001] ICR Part 5) in which the appeal tribunal referred to "range of reasonable conduct". The word "conduct" was wholly appropriate in the context of assessing the reasonableness of the employer's actions and was nothing to do with the narrower test of band of reasonable responses which had relevance and importance in the context of dismissal based on misconduct after an investigation had been carried out. The "response" was to the investigation and its results. In the circumstances, while the appeal tribunal accepted that lack of consultation in itself did not render dismissal for redundancy automatically unfair, if it was clothed, as in the present case, with an additional factor, amely, failure to investigate alternative employment, which would have been bound to arise in the onsultation process had it been undertaken, the matter became both broader and easier to assess. The mployment tribunal had properly considered the employers' conduct in that context and had determined he correct question, namely, that the employers did not act reasonably in failing to consult and to consider lternative employment.

Dundee City Council v Selbie; 3 May 2002; EAT/1060/01
EAT: Lord Johnston, Dr A H Bridge and Mr R P Thomson

WAGES

On her claim for unlawful deduction from wages in respect of unpaid overtime, an employment ribunal awarded an employee payments for hours worked in excess of the maximum number of 48 hours a veek including overtime prescribed by regulation 4(1) of the Working Time Regulations 1998.

JUDGE PETER CLARK, allowing an appeal by the employers, said that the starting point was the xpress term of the employee's contract of employment which provided that overtime rates were payable nly if overtime was specifically authorised in writing. There was no evidence that such authorisation had ver been given. Regulation 4(1) did not assist the employee in her overtime claim, whether by way of nlawful deduction or breach of contract, for the following reasons. Regulation 4(1) said nothing about a vorker's entitlement to overtime payments, and, assuming that the employers had breached regulation 4, y requiring the employee to work in excess of 48 hours per week, and were thereby in breach of a tatutorily implied term of the contract, such breach did not sound in damages and could not form the basis or an unlawful deduction claim under section 13(3) of the Employment Rights Act 1996. The nforcement machinery provided for in the 1998 Regulations did not extend to a right to compensation for reach of regulation 4 per se. Regulation 30(1) listed those breaches of specific provisions leading to an rder for the payment of compensation. Regulation 4 was not included in the list. It was important to ppreciate the purpose of regulation 4 and the underlying Directive 93/104/EC. It was to protect the health nd safety of workers and the remedies for non compliance were contained in sections 45A and 101A of he 1996 Act. It followed that the tribunal erred in finding that the employee was legally entitled to vertime payments such that a failure by the employers to make such payments amounted to an unlawful leduction from wages.

Forbuoys Ltd v Rich; 19 April 2002; EAT/144/01
EAT: Judge Peter Clark, Mrs D Palmer and Mr H Singh

DISCIPLINARY PROCEEDINGS

An employer's disciplinary code provided under the heading "gross misconduct" that summary dismissal would occur when an employee behaved in such a manner that it was unreasonable to expect the company to accept or risk a continuation or repetition of the same or similar behaviour and a list of categories of conduct followed which included abusive, objectionable or threatening behaviour to employees. It was also provided that in all cases of disciplinary action the need to satisfy the test of reasonableness applied and mitigating factors would be taken into account. An employee, who was summarily dismissed for gross misconduct following an incident when he swore and threw down a telephone receiver which then struck another employee, had his complaints of unfair dismissal and wrongful dismissal upheld by an employment tribunal.

MR RECORDER BURKE QC, dismissing an appeal by the employer against the finding of wrongful dismissal, said that the employer submitted that the express terms of the contract were such that the tribunal was not entitled to consider whether the conduct complained of was gross misconduct in the ordinary sense, i e so serious as to be repudiatory, but was entitled to consider only whether the conduct fell within the contractual definition, namely, any behaviour which fell within the categories listed however trivial. The effect of setting out categories in the contract, however, was to establish between the parties what kind of conduct might be regarded by the employer as gross misconduct; in the absence of sufficiently specific words, it did not produce the result that conduct falling within one of the categories was automatically to be treated as sufficient to justify summary dismissal, however trivial that conduct might be; and the tribunal was not shut out from considering, and needed to consider, whether the conduct relied on was sufficiently serious to be repudiatory. In *Neary v Dean of Westminster* [1999] IRLR 288, 291 Lord Jauncey of Tullichettle said that conduct justifying dismissal "must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment". There was no reason, in the absence of clear words to the contrary, why that well established principle should not apply in the present case. Even if that conclusion was wrong, the particular contractual terms in the present case produced a position more favourable to the employee than in a case where there were no contractual terms at all; at common law consideration of whether the conduct complained of was repudiatory would not involve consideration of overall reasonableness or mitigating factors. The words "the test of reasonableness" in the contractual provisions were sufficiently broad to require the tribunal to consider, in deciding whether the dismissal was wrongful, all the facts and matters which could sensibly be relevant to the question whether it was reasonable for the employer summarily to dismiss. Thus procedural defects on the part of an employer might be relevant, even though the tribunal concluded that the conduct complained of had been committed. Similarly, having regard to the contractual terms, the tribunal was bound to take into account mitigating factors. On the findings of fact made by the tribunal, their conclusion that the dismissal was wrongful was not perverse.

British Bakeries Ltd v O'Brien; 26 April 2002; EAT/1479/00
EAT: Mr Recorder Burke QC, Mr J R Rivers and Mr A D Tuffin

MINIMUM WAGE

An employer was served with an enforcement notice issued by a compliance officer under the National Minimum Wage Act 1998 requiring the employer to pay at least the national minimum wage to an employee and ordering, pursuant to section 19(2), the payment of £4,925.90 to the employee, which the compliance officer determined as the shortfall of what should have been paid on the basis of information given to him by the employee. On an appeal by the employer, the employment tribunal concluded, with regard to the payment required by the notice, that the evidence was so unsatisfactory as to the hours worked by the employee that it was wholly unsafe to draw any conclusion from which a calculation could be made, and it ordered the enforcement notice to be rectified by striking out the provision for payment.

MR RECORDER LANGSTAFF QC, allowing an unopposed appeal by the Inland Revenue, said that, if it was established by an employer to the satisfaction of the employment tribunal, under section 19(6)(c)(ii), that an enforcement notice was in error in specifying the wrong sum due to the worker, the employment tribunal were under a duty, under section 19(8), to insert the right figure. On their own recitation of the facts, it appeared that the evidence had satisfied employment tribunal, and therefore the employer had established, that the amount specified in the enforcement notice was incorrect. The tribunal should then have proceeded to do their duty under section 19(8) to rectify the notice. Given that duty, and given that no burden of proof applied to that exercise, what was required of the tribunal was to do the best they could on the material available to provide the best estimate of the amount that should have appeared in the notice. But the tribunal could not decide that the task was so difficult that they would simply award no payment at all. They had to give their best estimate, accepting all the imperfections and uncertainties of the material before them. The matter would be remitted to the same tribunal for a determination under section

(8). They would no doubt wish to hear such further evidence as either the employer or the appellant ught to put before them, but the scope of the inquiry was simply into what figure there should be in ctification of the enforcement notice as to the amount due to the employee in respect of the best estimate the hours that she had worked.

Inland Revenue Commission v St Hermans Estate Co Ltd; 2 May 2002; EAT/121/01
EAT: Mr Recorder Langstaff QC, Ms N Amin and Mr D J Hodgkins

EDUNDANCY PAYMENT

Redundancy payments for three applicant ancillary school workers, whose contracts required them to ork for only 44 weeks each year, were calculated by their employer on the basis of a week's pay arrived at dividing their annual salary by 52. Complaints by the applicants that one week's pay should have been lculated as 1/44th of the annual salary were dismissed by an employment tribunal chairman.

WALL J, allowing an appeal by the applicants, said that the chairman had been persuaded to uphold the nployer's calculation in the main by the point that payments of salary were made to the applicants onthly throughout the year, and that each was, therefore, employed throughout the year. The case had en argued before the appeal tribunal on the basis that the applicants' contracts of employment were nual, though there appeared to be a highly arguable case to the contrary. But the reality at the heart of ch contract was that the applicant was paid to work for a total of 44 weeks a year and was not required work, did not work and was not paid to work in the remaining weeks of the year. In the context of the rms of the contract, it was difficult to regard the manner of payment "in 12 equal instalments" as being ything other than an administrative convenience. It did not follow, because the applicants' pay was tificially divided into 12 monthly instalments, that, for the purposes of section 221(2) of the Employment ights Act 1996, their remuneration for employment in normal working hours did not vary with the nount of work done in the period. The remuneration did vary—not during the weeks they actually orked—but during the weeks they did not work at all. The applicants' "normal working hours" must ean the hours they worked in a normal working week. The phrase could not mean no hours in weeks hen they were plainly not required to work. A week's pay had to relate to a week's work. Since the plicants were required to work, and were paid to work, for only 44 weeks it seemed just that their odest redundancy payments should be calculated on the basis of the weeks they actually worked and not the basis of a notional 52-week calculation which took into account weeks they did not work and for hich they were not paid to work.

Gilbert v Barnsley Metropolitan Borough Council; 12 April 2002; EAT/674/00
EAT: Wall J, Mrs J M Matthias and Mr D Norman

EVIEW

The response, on 12 May 2000, to an applicant's application for a review of the decision of an nployment tribunal was that the chairman had directed that the application should be heard by the bunal and that a notice of hearing would be sent shortly. On 12 June 2002, no date having by then been xed, the applicant was sent a further letter stating that, on further consideration, the chairman had voked his earlier decision and that, in exercise of his powers under rule 11(5) of the Employment ribunals Rules of Procedure 1993, he refused the application for a review on the ground that it had no asonable prospect of success.

LINDSAY J, dismissing an appeal by the applicant against the refusal of his review application, said at, on the merits, the chairman had been entitled to take the view that the review had no reasonable ospect of success. The question was whether there was procedural error in the change between his first d second letters. Rule 11(5) of the Rules of Procedure provided no deadline by which the chairman's wer to refuse, if it was to be exercised at all, had to be exercised. It did not say that the power could not exercised if some indication had been given under rule 11(6). It did not say that the power could not be clined once and then exercised after all. There was nothing to say that the power under rule 11(5) was ent once a general indication had been given that there would be a hearing under rule 11(6), still less that le 11(5) was spent even before a notice of hearing was given under rule 11(6). There was no time beyond hich the ability to refuse under rule 11(5) became specifically inoperative, except impliedly, from the ms of rule 11(6), that power under rule 11(5) must become inoperative once the hearing of the tribunal der rule 11(6) had been started. That was, impliedly, the final point at which the power under rule 11(5) ust become incapable of exercise. There was no need to imply some time limit that was not expressly put ere, or even to create a reference to some events or circumstances which were not expressly referred to. ntil the hearing of a review application by the employment tribunal began the chairman's power under le 11(5) remained open to be exercised by him. Though it was not to be encouraged that the matter ould have been dealt with as it was, there was no error of law in the chairman's decision.

Ece v Newham London Borough Council; 22 February 2002; EAT/1035/00
EAT: Lindsay J, Mr I Ezekiel and Mr G H Wright

STRIKING OUT

At the hearing, in November 2000, of an employee's complaint, inter alia, of unfair dismissal, the fir respondent, the employee's former employer who had sold his business to the second respondent, applie to strike out the originating application, alleging that the employee had failed to comply with direction The tribunal decided to strike out the originating application under rule 13(2)(e) of the Employmen Tribunals Rules of Procedure 1993 on the ground that the conduct of the proceedings had been vexatious.

JUDGE REID QC, allowing an appeal by the employee, said that the tribunal decided that it was no necessary for the employee to have been given notice of the application to strike out because she wa present and represented by her husband who was given an opportunity to show cause orally why a striking out order should not be made. That was at best a doubtful decision because it meant that the husband ha to deal with the matter without any opportunity to consider or formulate his arguments against i Looking at the matters of complaint relied on by the tribunal in striking out, there were doubts as t whether their draconian decision was one which they ought to have taken, even on their view of the law However, it was clear that they did not have available authorities now conveniently gathered together i the judgment of the Employment Appeal Tribunal on 20 March 2002 in *Wilson v De Keyser Ltd* and di not, as they should have done, take into account the issue of whether or not a fair trial could still take place Although there were some issues of fact in the case, they were of a comparatively limited nature and ther was nothing to suggest that it would not now be possible for the case to be tried fairly. In thos circumstances, the tribunal were wrong in law to reach the conclusion they did and they should hav rejected the application to strike out. It was clear that there had been a transfer of an undertaking and tha under regulation 5(2) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 an liability the first respondent might have had now fell on the second respondent. The appropriate cours was, therefore, to remit the matter for hearing by a different tribunal as against the second respondent only

Preedy v Smith (trading as Easterhill Furniture); 26 April 2002; EAT/193/01
EAT: Judge Reid QC, Mr B V Fitzgerald and Ms G Mills

TIME LIMIT

An applicant employee was dismissed on 21 May 1999 when his employer's premises were destroyed by fire. Shortly afterwards, he and two fellow employees obtained Form IT1s, completed them by claiming redundancy payments and sent them off to the employment tribunal, but they were not received. In January 2000, when the applicant heard that another employee had had his case determined by an employment tribunal, he presented a second complaint, outside the six-month limitation period in section 164(1) of the Employment Rights Act 1996. An employment tribunal chairman decided that it would not be just and equitable to extend time under section 164(2) and dismissed the applicant's claim.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the applicant submitted that the chairman ought to have elicited from him the fact that his literacy was severely handicapped from a hearing disability as a child and that was a relevant factor which fell to be considered. That could not be accepted. There was no duty on the employment tribunal to tease out evidence which a party had forgotten to adduce at the hearing. The inexperience or incompetence of the party was not a relevant consideration on appeal. Reference had been made to *Harvey on Industrial Relations and Employment Law*, vol 1, E[2137.01] where, in relation to section 164(2) and (3), it was stated: "The relevant question for the employment tribunal includes whether the applicant is, in a broader sense, deserving of a redundancy payment." That bold statement was unhelpful and potentially misleading. It might suggest an unlimited discretion to award a redundancy payment to an applicant who had not complied with section 164(1) in a deserving case. The employment tribunal had a wide discretion to extend time if in all the relevant circumstances it was just and equitable to do so. Those circumstances had to relate to the late application, not the underlying merits of the claim, subject to the limited inquiry as to merits suggested by Phillips J in *Hutchison v Westward Television Ltd* [1977] ICR 279. On that footing, the editors correctly stated the position at E[2138]. The question was whether the chairman had failed to consider "all the other relevant circumstances" referred to in section 164(3)(b). The applicant correctly submitted that the tribunal's approach to the questions raised by section 164(2) and (3) mirrored those raised by section 76(5) of the Sex Discrimination Act 1975 and section 68(6) of the Race Relations Act 1976. In *British Coal Corpn v Keeble (No 2)* [1997] IRLR 336 Smith J endorsed guidance given when exercising the just and equitable discretion under the 1975 Act that tribunals should adopt as a check list the relevant mandatory factors in section 33 of the Limitation Act 1980, and that approach was expressly approved in *Director of Public Prosecutions v Marshall* [1998] ICR 518. It was clear that the chairman had considered only the question raised by section 164(3)(a) of the 1996 Act, which equated with section 33(3)(a) of the 1980 Act. He did not go on to consider all the *other* relevant circumstances. By extension those included the factors listed at section 33(3)(b)–(e) as well as the balance of prejudice question. The matter would be remitted for rehearing by a fresh tribunal. At that hearing it would be open to the applicant to lead evidence as to his literacy not placed before the chairman on the last occasion.

Patchett v Greenwoods (Interiors) Ltd; 17 May 2002; EAT/634/00
EAT: Judge Peter Clark, Ms S R Corby and Mrs D M Palmer

ONTRIBUTORY FAULT

An employment tribunal, on an employee's complaint of unfair dismissal, concluded that the employee ad not had a fair disciplinary hearing and, on balance, the dismissal was unfair, but that he was guilty of oo% contributory conduct, and it went on to reduce both the basic and compensatory awards by 100%, vithout giving the parties the opportunity to make submissions on the issue on contributory conduct.

MS RECORDER SLADE QC, dismissing an appeal by the employee, said that it was clear from ections 123(6) and 122(2) of the Employment Rights Act 1996 that there was power to reduce ompensatory and basic awards to a nil amount. That power was unfettered; and the 100% reduction was lainly open to the tribunal on the findings of fact it made. The employee submitted that the tribunal had rred in failing to inform him that it was going to consider the question of contributory fault, thus epriving him of opportunities to adduce evidence and make submissions on the point. Employment ribunals were masters of their own procedure, and it was clear that the question of a nil award had been aised in the employer's notice of appearance; but it was also apparent that the tribunal had not informed he parties expressly that it would proceed to consider the question of deduction for contributory fault at he same time as considering the fairness of the dismissal. It was an aspect of the fair conduct of roceedings that parties should be informed by the tribunal of what it would consider and decide at each tage of the proceedings: see *Iggesund Converters Ltd v Lewis* [1984] ICR 544, 552G. It was the question f contributory fault that was most liable to give rise to confusion which could be avoided if employment ribunals made it clear when that issue would be considered. In the present case the tribunal had not done o. However, considering the arguments which the employee would have advanced had he been asked, no njustice had been caused by the failure to make clear to the parties that contributory fault would be onsidered at the same time as the tribunal considered the fairness of the dismissal.

Green v Robins & Day Ltd (trading as Warwick Wright Clapham); 22 May 2002; EAT/83/01
EAT: Ms Recorder Slade QC, Mr D J Jenkins and Mr P A L Parker

RACTICE

At a pre-hearing review of an applicant's complaints of race and sex discrimination against 9 respondents, an employment tribunal ruled that the complaints against 16 respondents had no prospect f success and ordered the applicant to pay deposits as a condition of continuing with those complaints, ursuant to rule 7 of the Employment Tribunals Rules of Procedure 1993.

LINDSAY J, dismissing an appeal by the applicant, said that the applicant appealed on the ground, nter alia, that, contrary to rule 7(1) of the Rules, the employment tribunal had considered documents ubmitted by four respondents in their bundle. The appeal tribunal did not read rule 7(1) as precluding the ribunal from looking at material outside the originating application and notice of appearance, outside the epresentations in writing and outside the oral argument. They had to be considered but there was nothing o say that *only* those matters might be considered. For example, if the representations in writing in a ontract case included reference to the contract, why should the contract itself not be referred to at the pre-earing review? Moreover, if at the pre-hearing review in certain cases it became necessary to consider a arty's means under rule 7(5), surely it would be open to the tribunal, and could not be seriously argued therwise, that the means could be considered by reference to matters not in the originating application, ot in the notice of appearance and not otherwise falling within rule 7(1). For example, surely in such a ontext it would not be improper for a tribunal to call for either an affidavit of means or for material ocuments such as payslips. There was nothing in rule 7(1) that made it automatically an error of law to onsider documents going outside the specific headings of rule 7(1)(a)(b) and (c). What was relevant under ule 7(4) was necessarily somewhat limited and the fact that more documents chosen by the respondents vere referred to than documents chosen by the applicant was, of itself, of no significance. The respondents ad begun the case and so, necessarily, had to set it out and explain it in a way that later parties addressing he tribunal did not need to do. The appeal tribunal had been unable to find any error of law in the ribunal's decision.

Malkan v Chief Executive NHS Executive; 28 May 2002; EAT/1153/00
EAT: Lindsay J (President), Ms S R Corby and Mr P D Wickens

ROTECTED ACT

An employee who was alleging that he had been injured at work got a fellow employee to video the quipment concerned. When his solicitors disclosed the video to the employers' insurers, he was ummoned to a hearing by his employers (who were concerned because the production process involved vas confidential), at which he considered he was threatened that if he did not reveal who had made the video he would be sacked. He later resigned without giving a reason. On his complaint of unfair dismissa he claimed he had been constructively dismissed and that the dismissal was unfair under section 103A c the Employment Rights Act 1996 (inserted by the Public Interest Disclosure Act 1998) because the reaso for his dismissal was that he had made a protected disclosure. The employment tribunal, dismissing th complaint, found that the employee had not been threatened as he alleged, that he had resigned of his ow accord for his own reasons, that the making of the video could be a qualifying disclosure withi section 43B(1)(d) of the Act but that the employee had not suffered any detriment thereby.

JUDGE REID QC, dismissing an appeal by the employee, said that, on the evidence, the tribunal ha been entirely entitled to reach the conclusion that the employee left for his own reasons and not because c anything done or threatened by his employer. Though that disposed of any question of there bein victimisation because of a protected disclosure, the appeal tribunal had reservations about the mer making of the video being a protected disclosure. That there was a protected disclosure at the point whe the video was produced to the employee's solicitors was clear, and the introduction of an outsider wh could witness the confidential process and make a video could be a protected disclosure, but the appea tribunal was unconvinced that the making of the video by itself (if made by a fellow employee to whom nothing new was disclosed) amounted to a protected disclosure. For there to be detriment unde section 47B of the 1996 Act "on the ground that the worker has made the protected disclosure", the protected disclosure had to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive, for the treatment complained of" to borrow the words of Lord Scott of Foscote in the race relations case of *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, 1082 Similarly, if the detriment was (as was suggested) dismissal, the making of the protected disclosure had to be the reason or principal reason for the dismissal. In the present case, not only was there no dismissal, but the steps taken by the employer were not because of any protected disclosure that tended to show "that the health or safety of any individual has been, is being or is likely to be damaged"; it was solely because of the perceived breach of confidentiality of the production process.

Aspinall v MSI Mech Forge Ltd; 25 July 2002; EAT/891/01
EAT: Judge Reid QC, Mrs D M Palmer and Mr A D Tuffin

STAY

A female police constable brought a complaint of sex discrimination against the commissioner of police, alleging that she had been exposed to sexual harassment by a police sergeant at a police station where she had been serving. In December 2001 a chairman, sitting alone, rejected a submission by the commissioner that the complaint should be stayed in the light of the Employment Appeal Tribunal's decision in *Chief Constable of Bedfordshire Police v Liversidge* [2002] IRLR 15 that a chief constable was not liable under the Race Relations Act 1976 for the acts of one police constable against another. The chairman also directed that a preliminary issue as to the commissioner's liability should be dealt with on the first day set aside for the full hearing.

MR COMMISSIONER HOWELL QC, dismissing an appeal by the commissioner, said that for all practical purposes the wording of the relevant sections of the Sex Discrimination Act 1975 and the Race Relations Act 1976 were similar so that there was obviously a strong argument that, so far as domestic law alone was concerned, the result in a sex discrimination case brought against a chief officer of police would have to be similar to that in *Liversidge*. Though things had inevitably moved on since the chairman made his decision, the propriety of that decision had to be judged in the light of circumstances as they stood before him at the time. It was now known that, as well as *Liversidge* and *Chief Constable of Cumbria v McGlennon* [see post, pp 1135 and 1156], another case against a chief officer of police had been set down for 17 days, the employment tribunal having refused a stay, whereas a number of other cases had been stayed pending resolution of the issue of jurisdiction. On behalf of the commissioner it was submitted that (1) the chairman had misdirected himself by taking into account the applicant's contention that the effect of Directive 76/207/EEC required the result in a sex discrimination case to be different from *Liversidge*; (2) the chairman had erred in allowing irrelevant considerations to be given undue weight in holding that the disadvantages of delay to the applicant outweighed the irrecoverable costs and inconvenience caused to the commissioner if preparation for the hearing turned out to be unnecessary; and (3) it was perverse to have ordered a preliminary hearing on the first day of the full hearing. The appeal tribunal were unable to see that any aspect of the way the chairman had decided the difficult application with which he was faced was open to challenge as a matter of law. It was also reasonable for him to reach the decision he did, and the direction that the preliminary issue should be dealt with at the start of the main hearing was not unjustified in such a way as to make his decision perverse. But, though the appeal would be dismissed, any question of whether a renewed application should be made to the tribunal chairman was not thereby precluded. Matters having moved on since the chairman's decision, there might be matters that either or both parties might wish to advance before the chairman as a reason for reconsidering, on a renewed application, the question of whether the proceedings should go ahead as listed or the form in which they should go ahead.

Comr of Police of the Metropolis v Reilly; 22 March 2002; EAT/115/02
EAT: Mr Commissioner Howell QC, Dr D Grieves and Mr W Morris

NFAIR DISMISSAL

An employee was summarily dismissed from her employment as the resident manager of retirement
operties for gross misconduct when earlier the same day her employers' estates director had formed the
ew that she was drunk on duty. An employment tribunal upheld a complaint of unfair dismissal by the
nployee on the ground that, although the director had had reasonable grounds for his belief that the
nployee had been drunk, that belief had not been formed after conducting a reasonable investigation and
ving the employee a fair opportunity to present her case; and that a reasonable employer would have
spended the employee and warned her that she faced a formal disciplinary charge of being drunk on duty,
ossible consequence of which was dismissal.

LINDSAY J, allowing an appeal by the employers and remitting the matter for rehearing, said that the
easonable investigation" as part of the test in *British Home Stores Ltd v Burchell* [1980] ICR 303 was an
vestigation into the facts relating to the misconduct which was the subject of the employers' charge
ainst the employee. One did not disprove the adequacy of the investigation by saying that the employee
d not been fairly warned that she faced a disciplinary charge. The tribunal seemed to have confused
ctual investigation with the requirements of a fair procedure. The tribunal's approach seemed to suppose
at there was only one thing any reasonable employer could properly have done in all the circumstances,
mely, first to suspend, then formally to charge with a disciplinary offence, then to warn that dismissal
as a possible consequence, then to hold a formal disciplinary hearing and then to act on the outcome of
at hearing. But that ignored that the employers asserted that there had been gross misconduct,
something entitling the employers to meet the conduct with a summary dismissal. Where there was
mething which amounted to or was genuinely believed to amount to gross misconduct, that long
quence which the tribunal saw as being reasonable did not invariably need to be followed. Moreover,
d perhaps more importantly, the tribunal seemed to have shown no consciousness that what they should
ve been looking at was the band of reasonable responses. There were many cases where one could not
y that a reasonable employer would have done only one thing and nothing else, in which a range of
asonable responses was open to the employer. It was an error of law not to inquire into whether the
nployers' action was within that band.

Retirement Care Group Ltd v Greener; 22 May 2002; EAT/689/00
EAT: Lindsay J (President), Dr D Grieves and Ms B Switzer

APPEAL

An employee's complaints of racial and sexual discrimination and unfair dismissal were dismissed an employment tribunal. On her appeal to the Employment Appeal Tribunal, the appeal tribunal, at th preliminary hearing, directed the appeal to proceed on two only of the grounds in her notice of appeal.

MR COMMISSIONER HOWELL QC, dismissing the employee's appeal, said that some 12 month after the preliminary hearing and very shortly before the appeal was due to be heard, an indication wa given on behalf of the employee that she was seeking to raise two further grounds of appeal. These we related to two points in the extended reasons which suggested that there might be some grounds fo criticising the employer, the contention sought to be advanced being that the employment tribunal's failu to make more of them was a ground for setting their decision aside. The appeal tribunal were no however, satisfied that a proper case had been shown for taking the exceptional course of exercising an discretion in that area that might still be open, following the order made on the preliminary hearin restricting the scope of the appeal. While the possibility of the appeal tribunal using its case managemen powers to allow some limited departure from the defined grounds of appeal on which an appellant ha been permitted to proceed to a full hearing was not altogether ruled out, such cases were exceptional an subject, in particular, to the provisos that the point had been raised before the employment tribunal an that the appellant had explained why he had not appealed against the limiting of the grounds of appea *Miriki v General Council of the Bar* [2002] ICR 505, 517, para 28. Such a departure was not to be allowe where, as in the present case, there had been no explanation whatever why the additional contention relating to matters immediately apparent on the face of the extended reasons, could not have been raised i the notice of appeal or at the preliminary hearing or at any point before the very late stage at which it wa sought to introduce them. For the need for a full, proper and acceptable explanation to support an application to the appeal tribunal for the indulgence of an exercise of discretion to admit appeals out o time, see also *United Arab Emirates v Abdelghafar* [1995] ICR 65, 70H–71B, approved by the Court o Appeal in *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111. In any event, the points sought t be added were not of substantial merit. Accordingly, the application for the appeal tribunal to exercise it discretion to extend the scope of the appeal beyond the two limited grounds directed for a full hearing wa refused. The first ground of appeal for consideration related to the refusal to grant an adjournment Employment tribunals were experienced in dealing with unrepresented parties and ensuring that they got fair hearing of the case they were seeking to put forward, and the appeal tribunal had no doubt that ther was nothing in the first ground. The appeal tribunal had reached a similar conclusion on the secon ground, which questioned the way the tribunal had explained their reasons for not inferring racia discrimination by comparison with a possible comparator in the way sickness absence was treated. Th appeal tribunal found no difficulty in following what the tribunal were quite clearly saying—that the tw cases were materially different.

Qureshi v Camden London Borough Council; 11 June 2002; EAT/1173/00
EAT: Mr Commissioner Howell QC, Miss A Mackie and Mrs T A Marsland

COMPROMISE AGREEMENT

In 1998 an applicant employee settled her claims of sex discrimination and constructive dismissal against the hospital where she had worked on terms set out in a COT 3 agreement under which she received a sum "in full and final settlement of these proceedings and of all claims which the applicant has or may have against the respondent . . ." In 2000 she was asked by a surgeon to assist him as a technician at an operation to be performed privately at the hospital, which required her to be employed for the day by the hospital. When the hospital declined to sanction the arrangement, the applicant complained that she had been victimised because of her previous sex discrimination complaint against the hospital. An employment tribunal decided as a preliminary point that the 1998 agreement did not operate to preclude the applicant's further claim of victimisation.

JUDGE REID QC, dismissing an appeal by the hospital, said that the law as to contracts for release did not decline to allow parties to contract that all and any claims, whether known or not, should be released. The question in each case was whether, looking objectively at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction had to be placed on the scope of the release. If parties sought to achieve the extravagant result of releasing claims of which they had, and could have had, no knowledge, whether those claims had already come into existence or not, they had to do so in language which was absolutely clear and left no room for doubt as to what it was they were contracting for. There was no reason why as a matter of public policy a party should not contract out of some future cause of action, but it would require extremely clear words. In the present case there was nothing to indicate any intention to contract out of future claims. The expression "have or may have" was apt to cover existing claims whether known to the potential claimant or not. So far as the nployee's present claim was concerned, that arose out of the alleged conduct of the hospital after the date the agreement. That conduct was actionable, if at all, only by reason of what had occurred earlier. But, was not the earlier actions of the hospital or anything which occurred in the course of the employee's nployment or in the events leading up to the making of the agreement which gave her her claim. What ve her her claim was the alleged conduct of the hospital in refusing to allow her to act as a technician in e late summer of 2000. The true construction of the agreement did not preclude her from bringing the esent proceedings.

Royal National Orthopaedic Hospital Trust v Howard; 14 August 2002; EAT/861/01
EAT: Judge Reid QC, Mr I Ezekiel and Mr G Wright

ME LIMIT

The Registrar of the Employment Appeal Tribunal refused to extend time for respondent employers to dge a notice of appeal against a finding of liability for unfair dismissal, in circumstances where their licitor had faxed the notice of appeal to the appeal tribunal on the day the 42-day time limit expired thout ensuring that the fax had been successfully transmitted and the fax had arrived the following day.

LINDSAY J, dismissing an appeal by the employers, said that any solicitor who left service of a notice of peal until late on the last day needed to take special care to ensure that it had been received by the appeal bunal by whatever means he attempted delivery. That was not done in the present case. In the cumstances, it was not some unreasonable counsel of perfection for the solicitor to have actually seen at the message had gone through, and, if it had failed to go through, to have remedied the situation. In *imden & Islington Community Services NHS Trust v Kennedy* [1996] IRLR 381 the appeal tribunal ited that, for a solicitor to act reasonably and without fault, there had to be a system in place which abled the solicitor to find out contemporaneously whether the conduct of business was taking a normal urse and to check, at or near the time, that replies which should have been received at a given date had in ct been received. Though that was a postal, not a fax, case and was concerned with lodging an iginating application, rather than a notice of appeal, the principle remained that it was important that e solicitor—especially where the case was a late service on the last day—should *contemporaneously* see at the conduct of business was taking a normal course. The traditional approach of the Employment ppeal Tribunal was to take a stringent line on late appeals, which approach, given the relatively generous riod of 42 days, was not improper.

David Webster Ltd v Holohan; 26 February 2002; PA/857/01
EAT: Lindsay J, President (as in chambers)

ME LIMIT

The Registrar of the Employment Appeal Tribunal refused a request by an appellant to extend the time r appealing against an employment tribunal's decision that he should remain a respondent to sex scrimination proceedings brought by an employee against her employers, a local authority, and against e appellant, who was a councillor.

JUDGE PETER CLARK, dismissing an appeal by the appellant from the Registrar's decision, said that e relevant domestic authorities applicable to a refusal of an extension of time for appealing were to be und in *United Arab Emirates v Abdelghafar* [1995] ICR 65, approved by the Court of Appeal in *Aziz v ethnal Green City Challenge Co Ltd* [2000] IRLR 111. Applying those principles, there was no doubt at the Registrar had exercised her discretion correctly. Waiting for a subsequent employment tribunal cision was not a good excuse for delaying the lodging of a notice of appeal against the first decision. It as, however, submitted that the guidance in *Abdelghafar* should be read subject to the Civil Procedure iles and the Human Rights Act 1998. Attention had been drawn to CPR r 3.9, read with the court's anagement powers under r 3.1(1). R 3.9 set out a check list of factors to be considered by the court in termining whether, in all the circumstances, time should or should not be extended. One of those factors as whether there was a good explanation for a party's failure to comply with any rule—which was flected in the *Abdelghafar* principles. In *Aziz* it had been argued that the *Abdelghafar* approach ought t to be followed because it was stricter than that adopted by the Court of Appeal when considering peals brought out of time. While the court accepted that the *Abdelghafar* approach was stricter, it held at such an approach was acceptable, bearing in mind that the appeal tribunal was a statutory body with wer to regulate its own procedure. The appeal tribunal procedure was not strictly subject to the CPR. It as significant that, whereas the principles underlying the CPR were to some extent incorporated into the nployment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (see, particularly, rule 10), such incorporation was to be found in the Employment Appeal Tribunal (Amendment) Rules 2001. In ose circumstances, the advent of the CPR, even if they allowed of any different result, which was ubtful, in no way altered the approach laid down in *Abdelghafar* and *Aziz*. Reliance was then placed on ticle 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms—the right to a r trial and the right of access to a court. It was submitted that in some way the first instance tribunal led expeditiously to provide reasons for its decision forming the subject of the appeal and that strict application of the time limits, subject only to extension in rare and exceptional cases, breached th applicant's article 6 rights. Both those propositions were rejected. The decision presently under appea was delivered orally at the hearing and promulgated with extended reasons 10 days later. There was n delay. The delay on the part of the second tribunal in promulgating its decision was immaterial. Further, a strict application of the time limit for appealing did not offend article 6: see, by analogy, the unsuccessfu challenge to the qualifying period for unfair dismissal claims in *Stedman v United Kingdom* (1997 23 EHRR 168.

Driver v Preston Borough Council; 11 June 2002; PA/1090/01
EAT: Judge Peter Clark (as in chambers)

TIME LIMIT

By letter of 18 January 2001 an employee was informed that he was summarily dismissed for gross misconduct. He initiated an internal appeal which was dismissed on 13 March 2001, until which date he was paid as if he were still employed. In subsequent correspondence the employer's solicitors said "You were dismissed on 13 March 2001." The employee presented complaints of unfair dismissal and race discrimination on 4 June 2001. An employment tribunal found that the effective date of dismissal was 18 January 2001, that the complaint of unfair dismissal had not been presented in time and the tribunal did not have jurisdiction to consider it, and that the complaint of race discrimination had not been presented in time but that time would be extended time in relation to those claims connected with his dismissal.

JUDGE REID QC, allowing an appeal by the employer and dismissing a cross-appeal by the employee, said that the terms of the letter of 18 January 2001 were unequivocal. There was no contractual context which could give rise to even a hint that it did not amount to an immediate dismissal. The events after the dismissal which were more consistent with there having been only a suspension could not alter the fact that there had been a dismissal. The doctrine of estoppel had no relevance. In the case of a dismissal without notice the effective date of termination was defined by section 97(1)(b) of the Employment Rights Act 1996 as "the date on which termination takes effect". The complaint of unfair dismissal had to be presented within three months of that date under section 111. That date could not be varied by an estoppel arising from the conduct of one of the parties. It would be possible to pray in aid such matters in support of a submission that time should be extended under section 111(2)(b), but it had not be suggested in the present case that any such matter had been the cause of the application being out of time or had rendered it impracticable to make the complaint in time. Different considerations applied to the race discrimination claims. The employment tribunal's basis for considering it just and equitable to extend time for the dismissal-related discrimination claim was that there was "an element of ambiguity about his precise relationship with the company in the period to 13 March" and that the employer "was unable to specify any particular detriment to it if the period was extended". It was not clear how the supposed ambiguity in the relationship could have been a basis for extending time. It was not, however, necessary to reach a concluded view as to whether that passage indicated an error of law, because there was nothing in the originating application which identified anything that might be an act of discrimination in connection with the employee's dismissal. The employment tribunal were wrong in principle in allowing an extension of time so that an entirely unparticularised claim could be pursued. The tribunal could only properly have exercised their discretion to extend time if they could identify the matters which were to be the subject of complaint and, on the material before them, they could not do so.

Highdorn Co Ltd v Saleh; 16 August 2002; EAT/80/02
EAT: Judge Reid QC, Mr D J Jenkins and Mr A E Manners

IENDMENT

After respondent employers had filed a notice of appearance stating that they did not intend to resist the licant's equal pay claim, accompanied by a letter agreeing she had a claim, they applied, the day before t fixed for the hearing, to amend the notice of appearance to deny liability. The application, opposed by applicant, was granted by a tribunal chairman by a letter which gave no reasons for his decision. A uest for a review was refused.

WALL J, allowing an appeal by the applicant, said that, while there were clearly differences between an lication to amend an originating application and an application to amend a notice of appearance, the nciples laid down by *Selkent Bus Co Ltd v Moore* [1996] ICR 836 applied to both. For the appeal unal to interfere with the exercise of a chairman's discretion to permit an amendment, the chairman's ision had to fall foul of the criteria for the exercise of that discretion identified by Mummery J in *kent*. Under the Employment Tribunals Rules of Procedure 2001 there was no obligation on a chairman give reasons for an interlocutory "decision" such as the one under appeal, but the consequence was that absence of reasons made it impossible for the appeal tribunal to know what factors had influenced the irman, how he had balanced them and what weight, if any, he had given, in particular, to the fact that consequences of the amendment might deprive the applicant altogether of her cause of action. Many isions to allow amendments were purely formal, uncontroversial or minor, and the system could not ction if chairmen were required to give detailed reasons for every interlocutory decision, but the ision in the present case was a considered one. The chairman had quite properly asked the applicant for response to the application, and she had replied in a full and well reasoned letter. From the applicant's spective, the absence of reasons meant that she had no idea why she had lost. In a decision as important he proceedings as the present, such an outcome was unsatisfactory. The employers pointed out that re was no appeal against the refusal of the chairman to review his decision for reasons set out in the usal letter. That did not affect the issue. The appeal concerned the original exercise of the discretion. If t was wrong, the refusal to review must also be wrong. Furthermore, the review decision did not lress the fundamental issue in the case, namely, that by virtue of an amendment which sought to renege an agreement in order to avoid liability and pass it on to a transferor employer, the applicant was placed position whereby she might have no justifiable cause of action against either employer. Two points m *Skelkent* were directly applicable. The first was the nature of the amendment. It could not have been more fundamental nature, involving as it did a complete volte face, with the employers reneging on an eement freely entered into, leaving the applicant with no alternative but to apply for the transferor to be ned and the transferor taking the point that the application was out of time. The second point was the ay in making the application to amend. No explanation was given for the employers' radical change of nce. It was fundamental to the exercise of a judicial discretion in a case such as the present that there uld be good reasons advanced for its exercise and that it should only be exercised for good reason. The peal tribunal was in no doubt that, on a proper application of the balancing exercise required by *Selkent*, decision to permit the employers to amend the notice of appearance was plainly wrong. The injustice l hardship involved in granting the amendment was very much greater than that which would have been olved in refusing it. The chairman's decision would be set aside and the matter remitted to a different irman to reconsider the constitution of the proceedings.

Chadwick v Bayer plc; 14 June 2002; EAT/1110/01
EAT: Wall J, Mr P A L Parker and Mr G H Wright

S

Four of five similar complaints of unfair dismissal were ordered to be heard together, the other being ourned generally. Three cases were withdrawn on the second day of the hearing. The remaining case ceeded. The widow of the applicant whose case had been adjourned later obtained the restoration of complaint. The chairman who had presided at the effective hearing reviewed that decision, sitting alone he pre-hearing review, rejecting a submission on behalf of the applicant's widow that he was likely to be judiced because of his involvement in the earlier case, held that the case did not stand any reasonable nce of succeeding and required payment of a deposit.

JUDGE LEVY QC, allowing an appeal by the applicant's widow, said that the issue on the appeal was ether the chairman had applied the wrong test in deciding whether he should hear the matter. It was nmon ground that the right test was that expressed by Lord Hope of Craighead in *Porter v Magill* 02] 2 WLR 37, para 102, approving Lord Phillips of Worth Matravers MR in *In re Medicaments and ated Classes of Goods (No 2)* [2001] ICR 565, 591, para 85. It was desirable that, where a question of s was raised, those considering the issue should ensure that they were fully familiar with the current e of the law. Looking at the position as it was when the chairman made his decision, there had been a ring with which the chairman had been concerned in which the applicant was not a party but in which he had featured. The chairman and his colleagues had formed some views as a result of that hearing wh were not necessarily known to counsel representing the present appellant and did not take into accou matters in the applicant's originating application. He expressed strong views in the course of the heari before him of the merits of the case which the appellant was bringing. Furthermore, he was asked to recu himself because of the circumstances. The appeal tribunal was strongly of the opinion that, in the words Lord Phillips MR in *In re Medicaments*, a fair-minded and informed observer would have concluded th there was a real possibility or a real danger that the tribunal was biased. That was sufficient to allow t appeal, though the chairman might have been right in saying that the appellant would have an up struggle in the employment tribunal.

Attrill (decd) v Wightlink Ltd; 4 July 2002; EAT/1003/01
EAT: Judge Levy QC, Dr D Grieves and Mrs M T Prosser

COSTS WARNING

An applicant complaining of unfair dismissal asserted that she had been employed by the respondent the manageress of a service station since 1993. A preliminary issue was directed to be determined as whether her relationship with the respondent was one of employer/employee and, if so, whether she ha sufficient service to qualify for protection from unfair dismissal. The applicant's case was listed with thr similar cases for a three-day hearing. During the first day, after hearing submissions from counsel for th respondent and from the applicant, who was in person, the tribunal indicated that the applicants faced th risk of an order for costs if they did not withdraw their claims. The applicant said that faced with the thre of substantial costs she could not go ahead, and the tribunal decision was that the application wa dismissed on withdrawal by the applicant. The Employment Appeal Tribunal allowed an appeal by th applicant and remitted the case, initially for directions (Recent Points [2002] ICR Part 4).

SCOTT BAKER LJ, dismissing an appeal by the respondent, said that the appeal raised the question whether, and if so in what circumstances, it was appropriate for an employment tribunal to point out to a applicant that failure of the claim might lead to an adverse costs order. A tribunal had to be particular careful not to place unfair pressure on a litigant in person and should only make costs warnings such a were made in the present case where there was a real risk that an order for costs would be made against a unsuccessful applicant at the end of the hearing. The critical question was whether the risk of a costs orde being made against the applicant was sufficiently high to justify the pressure placed on her. His Lordshi had come to the conclusion that the pressure was disproportionate. It was difficult to see how the applican could be said to have acted "otherwise unreasonably" in the sense envisaged by rule 12(1) of th Employment Tribunals Rules of Procedure 1993. The tribunal had ruled that it was not an abuse o process to proceed with the employment point and the tribunal was not as a matter of law bound by th decision of an employment tribunal at Liverpool in a similar case. The applicant was entitled to argue tha that decision was wrong. On the continuity point she had a respectable argument that there had bee continuous employment for the required two-year period. Against that background the costs warning wa unfair. It left the applicant in no doubt that if she continued and lost she was at a real risk of a substantia order for costs that might be enforced against her house. She simply could not afford to take the risk. Hi Lordship agreed with Judge Wakefield's analysis in *Lewis v Kingston-upon-Thames Royal Londo Borough Council* (Recent Points [2001] ICR Part 8). The ultimate question was whether the applicant ha been denied a fair hearing. The danger was that where a tribunal made or pressed a costs warning that wa not justified or in a manner that was not justified an applicant would be deprived of a hearing. In the ligh of the high threshold that prevailed at the time under rule 12(1) of the 1993 Rules the prospect of any cost order against the applicant, let alone one that placed her house at risk, seemed remote.

SEDLEY and SIMON BROWN LJJ gave concurring judgments.

Gee v Shell UK Ltd; 24 October 2002; [2002] EWCA Civ 1479
CA: Simon Brown, Sedley and Scott Baker LJJ

LISTING

An employment tribunal chairman refused a request by an applicant to postpone or reschedule the hearing of his complaint of race discrimination made on the ground that the fact that it had been set down for eight days spread over a period of five months prejudiced a fair hearing.

LORD JOHNSTON, on an appeal by the applicant, said that it appeared that the reason for the somewhat unusual scheduling of the hearing was not pressure on the tribunal system, but to comply with requirements of the parties, particularly the respondents, as far as availability of witnesses was concerned to minimise clashing with their professional commitments. Though it was wholly inappropriate for the appeal tribunal to issue any form of instruction as to how the employment tribunal should run its own affairs and administer its listings, there were one or two observations that could be made. In the first place, the deliberate scheduling of a case whereby there were gaps between every day of a proposed hearing was unsatisfactory and to be avoided unless absolutely necessary. That was because it lent itself to the risk of a division between examination and cross-examination of a witness, which was unsatisfactory and not nducive to good case management. If the gap in time was substantial, it would appear to make it more icult for the tribunal to compare examination in chief to cross-examination by way of recollection. But t was not to suggest that any form of intermittent hearing had to be avoided in the sense that all hearings d to be continuous. Practical difficulties would arise both in relation to the availability of witnesses and tribunal management if that became an absolute rule. On the other hand, it was extremely important ninimise any such time gaps and certainly hearings should be scheduled in any case to allow at least two more days of hearing at any one time even if there had to be a gap. It was not conducive to good practice have a hearing scheduled in the way in which it had been done in the present case, however well entioned. Equally, the appeal tribunal was not impressed with the notion that hearings had to be set to commodate the professional or other external requirements of either witnesses or parties. An applicant s entitled to a speedy resolution of his case unhampered by the external requirements of the opposite ty. The appeal would be allowed inasmuch that the case would have to be rescheduled in any event, and vas to be hoped that the appeal tribunal's observations would be put into practice.

Kumar v University of Strathclyde; 4 July 2002; EAT/3/02
EAT(Sc): Lord Johnston, Mr A J Ramsden and Miss A Martin

ACTICE

An employment tribunal dismissed an employee's complaint of unfair dismissal at the close of the ployee's case on the ground that there was no evidence of any breach of contract by the employers that uld have justified the employee's resignation.

MISS RECORDER SLADE QC, allowing an appeal by the employee and remitting the complaint for earing, said that it was not an error of law for an employment tribunal in an appropriate case to nsider of its own motion whether a respondent had a case to answer. The parties might be unrepresented d unaware of the possibility of making such a submission. The Employment Tribunals Rules of ocedure 1993 and 2001 both conferred on employment tribunals a wide discretion in the conduct of oceedings which enabled a tribunal to consider of its own motion whether there was a case for the pondent to answer. Appropriate cases would occur but rarely and should be considered in accordance ch the principles to be derived from the authorities. *Ridley v GEC Machines Ltd* (1977) 13 ITR 1995 d *Coral Squash Clubs Ltd v Matthews* [1979] ICR 607 established that the threshold for determining t there was no case for a respondent to answer was a high one and referred to an approach that the ounal should reserve the exercise of its discretion to dismiss a case without hearing from the other party exceptional cases which were "obviously hopeless" or where the party on whom the onus of proof lay d clearly failed in law or in fact to establish what he had set out to establish. In so far as those authorities licated a different approach from that in *Elwick v Kingston Upon Hull County Council* (unreported) October 1994, the appeal tribunal preferred the approach in the earlier cases. It was unlikely, having gard to comments in its decision, that the employment tribunal had applied the high threshold referred to the guidance to the exercise of the discretion to dismiss a case at "half time" set out in *Ridley* and *Coral uash Clubs*. The tribunal, in deciding to dismiss the claim on the basis that the employee had failed to ablish that he had been dismissed, had erred in law in failing to consider the effect of the acceptance by employers, stated in their notice of appearance, that the employee had been dismissed by them on April 2000. It was significant that the findings of fact made by the tribunal stopped at 17 April and did include the dismissal letter of 19 April or refer to the disciplinary hearing of the same date. An mission of dismissal in the notice of appearance, at the very least, called for an explanation from the ployers, and the tribunal had erred in law in deciding the case without hearing their case. A respondent uld choose not to call evidence. If that occurred, a tribunal could draw inferences from the material ore it, which in the present case included the minutes of the disciplinary hearing, the dismissal letter and notice of appearance.

Leach v Flexiprint Ltd; 17 September 2002; EAT/163/01
EAT: Miss Recorder Slade QC, Mr B Gibbs and Ms H Pritcher

AMENDMENT

In his originating application complaining of disability discrimination, an applicant stated: "Despi having had a heart attack and with ongoing heart disease, so having a disability under the Disabili Discrimination Act, my employment was terminated without having regard to and contrary to t provisions of the Disability Discrimination Act." Seven months later the employment tribunal allowed t applicant to amend the originating application to complain that he had been unfairly dismissed, holdin that it was clear from the originating application that the applicant was claiming that he had bee dismissed without good reason and that, therefore, there was a causative link between the originatin application, the brief facts stated, and a claim for unfair dismissal.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the respondent employer, said that unde the Rules of Procedure then applicable the tribunal had a discretion to permit an amendment without the being an express requirement that any claim sought to be introduced by amendment had to comply wit the time limits which would otherwise be applicable if it were brought by way of a separate originatin application. The employer submitted, first, that the amendment was not simply a matter of re-labelling th application; it was a completely new claim, and the tribunal had not directed itself specifically by referenc to section 111 of the Employment Rights Act 1996, which provided for the time limit applicable to claim of unfair dismissal. It was argued that *Harvey v Port of Tilbury (London) Ltd* [1999] ICR 103 demonstrated that the essential matter for the tribunal to consider on an application to amend was the tim limit that would otherwise be applicable had there been a free-standing application. In *British Newspape Printing Corpn (North) Ltd v Kelly* [1989] IRLR 222, where it was sought to amend a complaint o redundancy to add unfair dismissal, the Court of Appeal indicated that the tribunal should have aske what relevant hardships would be suffered by the parties if the amendment was, or was not, allowed. Th appeal tribunal was bound by that decision and had to reject the submission that the only consideration to which the tribunal should have had regard was the question of the time limits, though they would almos always be an important consideration. The employer urged that the tribunal could not simply identify from the fact of the words "my employment was terminated" that the applicant was complaining abou unfair dismissal, still less when he had identified the reason for dismissal as being because of his disability The test was not whether the appeal tribunal would have regarded the originating application as making a claim of dismissal and of the essential unfairness of that dismissal, but whether the employment tribuna had been entitled to take that view. Taking that approach, although the tribunal might have been benevolent towards the applicant, it had been entitled to regard the words in the originating application as essentially conveying a complaint about dismissal. Where facts were sufficiently identified in an originating application, from which a consequence in terms of compensation might flow if the appropriate legal label was attached, it might be appropriate to focus less on delay and more on potential injustice than if there were little connection between the facts outlined in the originating application and the cause of complaint identified under statute. But the tribunal did have regard to the delay, and the appeal tribunal could not interfere with its exercise of discretion.

Swiss Re Life and Health Ltd v Kay; 11 July 2002; EAT/680/01
EAT: Mr Recorder Langstaff QC, Mr D J Jenkins and Mr P D Wickens

BANKRUPTCY

Following a letter from the trustee in bankruptcy of an applicant who had made a complaint of unfair dismissal saying that he did "not wish to continue the debtor's claim", an employment tribunal made an order dismissing the complaint "on withdrawal by the applicant". Thereupon the applicant wrote to the tribunal saying he wished to continue the proceedings himself, and he received a letter from the trustee saying: "This does not mean that I will stop any action" and advising the applicant to seek legal advice "If you wish to pursue the action in your own name". The matter came before a tribunal on review. The review, which the applicant arrived too late to attend, was refused and the applicant was ordered to pay £500 towards the respondent's costs.

JUDGE REID QC, dismissing an appeal by the applicant, said that it was clear from the context and the letters that the trustee in bankruptcy had not assigned back to the applicant the claim which the applicant had made and which had vested in the trustee on the applicant's bankruptcy, and there was no evidence to support the suggestion that there had at some point been an oral equitable assignment by the trustee in bankruptcy to the applicant of the right to continue the employment tribunal claim. It was then argued that the result of there being a possibility of a remedy which included a compensatory award for injury to feelings was that the cause of action did not vest in the trustee in bankruptcy under the Insolvency Act 1986 and the applicant was therefore in a position to continue his claim. That was incorrect. It might be that, so far as that part of any damages recovered reflected a personal loss in the sense of pain felt in body or mind, such as a claim for libel, the trustee in bankruptcy would not hold that part of the damages, but that did not an that the bankrupt had a sufficient interest himself to continue the claim: *Ord v Upton* [2000] Ch 352. e applicant had had no right to carry on with the proceedings at the time of the dismissal of the claim, or review. The second question was whether, having refused the review, the tribunal should have made an er for costs. As well as perversity, it was submitted that, once the cause of action vested in the trustee in akruptcy, it could not be said that the applicant was a party for the purposes of rule 12 of the ployment Tribunals Rules of Procedure 1993 and that, therefore, there was no power to make an order costs against him. But, if someone held himself out as a party and made an application asserting that he s a party, then so far as the proceedings on such an application were concerned he was a party for the pose of having a costs order made against him. Accordingly, there was jurisdiction to make the order, l there was nothing in the making of the order which could properly be said to be an improper use of the unal's discretion, and the appeal in relation to the costs order of £500 would also be dismissed. Having eived a warning in fairly strong terms on the preliminary hearing that he was at risk as to costs, the licant had chosen to take that risk and it was, therefore, appropriate, given the obvious deficiencies of appeal, that an award of costs should be made and he would be required to pay a contribution of 500 towards the respondent's costs.

Ellison v Petrie Tucker & Partners Ltd; 19 July 2002; EAT/795/01
EAT: Judge Reid QC, Mr P R A Jacques and Mr A E R Manners

MPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal, which was admitted, and laim of breach of contract and dismissed other claims. At a remedies hearing he was awarded £7,417 h interest up to the date of the decision for breach of contract and £8,745 for unfair dismissal.

LINDSAY J, dismissing appeals by the employee, said that the employee submitted, inter alia, that he l been prejudiced by details of a without prejudice offer from the employer being improperly laid before employment tribunal. The employer's solicitors had written to the employment tribunal admitting that dismissal was unfair and adding that negotiations had taken place at which the employer had agreed to £15,364 to the employee. At a subsequent directions hearing the tribunal recorded that the employer s "prepared to abide by the terms of the draft compromise agreement by a payment of the sum of 5,364". By then there was an open offer by reference to the draft agreement which the employer was itled to bring to the tribunal's attention. If the solicitors' letter had said "We agree to pay £15,364", re could have been no possible complaint, but they had then referred back to an earlier offer which had en made without prejudice. However, the only practical effect, if any, of that would be as to costs urred between the earlier offer and the later, and in the employment tribunal regime costs did not follow event and the employer was never in a position to argue that it had been unreasonable of the employee to accept its offer. The appeal tribunal failed to see how the employee suffered any relevant prejudice, l there was nothing improper in a tribunal referring in the course of a remedies decision to an open offer blicly made. Turning to the employee's claim in respect of loss of accommodation, the employment unal found that under the contract of employment the employer was not obliged to provide ommodation. The appeal tribunal was not convinced that section 123(3) of the Employment Rights 1996 enabled compensation to be paid *only* for that to which an applicant was *contractually* entitled. e expression "loss of any benefit which he might reasonably be expected to have had but for the missal" appeared not to be restricted to matters to which there had been a contractual requirement or in pect of which some contractual expectation existed. However, quite apart from a finding that the ployee was put to no new expense, a new job, without accommodation, paid almost £9,000 pa more, l the employment tribunal decided that it was not just and equitable to compensate him for the loss.

Gould v Governors of Haileybury & Imperial Service College; 19 July 2002; EAT/635 & 1191/00
EAT: Lindsay J (President), Mr A D Tuffin and Miss D Whittingham

MPENSATION

An employment tribunal awarded an applicant compensation for sex discrimination totalling £43,149 espect of loss of future earnings, injury to feelings, aggravated damages and interest.

MAURICE KAY J, allowing in part an appeal by the employer, said that, in making an award of ,000 for injury to feelings, the employment tribunal had described the treatment of the applicant as palling petty conduct which resulted in extreme unhappiness" and placed it as a "moderately severe e". The correct approach for the appeal tribunal was to ask whether the award was plainly wrong, or side the permissible bracket, having regard to all the principles set out in *Prison Service v Johnson* 97] ICR 275 and of what it knew of awards in other cases. Without making light of the injury to the licant's feelings, the appeal tribunal had concluded that to quantify the compensation for injury to ings at £15,000 was plainly wrong and arose from an inappropriate categorisation which had been r-emphasised as a criterion in any event. The appropriate figure was £10,000. The employment unal had reasoned its award of £7,500 as aggravated damages by saying: "The applicant was treated lly and her complaint resulted in a minimal letter from [the principal of the firm]. The applicant was told that she would be supplied with no reasons for the failure to gain a training contract. She was th given a letter belittling her abilities. When she took tribunal proceedings a monumental amount of eff was put into defending those proceedings. . . The defence of these proceedings was deliberately design by the respondents to be intimidatory and cause the maximum unease and distress to the applicant." The was no doubt that aggravated damages could be a legitimate head of compensation, but it was submitt that to award aggravated damages by reference to conduct in the defence of the proceedings would be unwarranted extension and that there were better ways of dealing with that problem, e g by an order f costs to reflect unreasonableness in the conduct of the proceedings. The problem with that approach w that it was limited to a reflection of costs unreasonably incurred and was unrelated to the victim's "prop feelings of dignity or pride" to use the words of Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 122 There was no reason in law why aggravated damages should not be awarded by reference to conduct in t defence of proceedings in a discrimination case such as the present, and there was a very good policy reas for allowing such a claim. If a respondent misconducted himself it might amount to victimisation respect of the protected act of bringing the claim. It would be regrettable if such victimisation could on be compensated by the commencement of further proceedings. It was preferable that where there w misconduct of sufficient gravity it was compensated by the tribunal seised of the matter, which had the fe for the aggravating material and its effect on the victim. The figure of £7,500 was not appealable. It was be observed that it was not limited to misconduct in the defence of the proceedings but included a reflecti of the manner of the discrimination. It was, however, erroneous to award interest on the £7,500 for th whole period from the termination of the applicant's employment, when the misconduct in the defence the proceedings only arose later, and, taking a broad brush approach and taking account of the reductio in the award for injury to feelings, the interest would be reduced by £502. By way of warning, litigan would be wrong to read the case as giving the green light to claims for aggravated damages in respect alleged misconduct in the defence of proceedings. Such cases would be few and far between.

Zaiwalla & Co v Walia; 24 July 2002; EAT/827/00
EAT: Maurice Kay J, Dr D Grieves and Mr P R A Jacques

DISABILITY DISCRIMINATION

An employee, a senior benefits assessor, made a complaint that she had been discriminated against i contravention of the Disability Discrimination Act 1995 when she was issued with a final written warning by her employer because of her high level of sickness absence. She contended that to include her absenc from work as a result of her disability when considering its incapability procedure for health was les favourable treatment for a reason related to her disability and that the employer should have made ar adjustment by excluding that part of her absence. An employment tribunal, dismissing her complaint found that the employer was justified in taking action in relation to a person who was absent through ill- health and that the employers' treatment of the employee was justified within section 5(1) and (2)(b) rejecting her claim that she came within the phrase in section 6(3)(f) "allowing [a person] to be absen during working hours for . . . treatment" as being a reasonable adjustment for the employer to make.

WALL J, dismissing an appeal by the employee on the preliminary hearing, said that the employee submitted that the tribunal erred in stating that her proposed adjustment was unreasonable in that it would generate ill-feeling and a potential for unauthorised absenteeism to grow and that it was for the tribunal to consider the particular circumstances of the employee's case not the matter in principle. The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. The tribunal were correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism. In any event, it would not be a practical step for the employer to take. It would severely undermine the scope and range of the sickness procedures and would have a financial impact on the employer and disrupt its activities, in particular its ability to perform its statutory function in relation to housing benefit.

Bray v Camden London Borough Council; 23 July 2002; EAT/1162/01
EAT: Wall J, Mr D J Jenkins and Mrs R A Vickers

SABILITY

An employment tribunal found, as a preliminary point, that a 29-year-old employee, who had made a nplaint of disability discrimination against his employers, suffered from a physical impairment, namely enerative disc disease, which was more than minor or trivial and that he was disabled for the purposes the Disability Discrimination Act 1995. In doing so, the tribunal found that cycling, football and ying snooker, particularly for the employee's age group, were normal day-to-day activities and that the ployee was unable to perform those activities.

JUDGE REID QC, allowing an appeal by the employers, said that the employment tribunal had oressed the view that, although the Guidance on matters to be taken into account in determining estions relating to the definition of disability excluded specific games and sports, considering "the erwhelming health advice continually given throughout the media, to exclude normal endeavours at ess from normal day-to-day activities the Guidance inaccurately reflected current society". The idance would only be of assistance in what might be described as marginal cases. Clearly the present s such a case and the tribunal were therefore required to take into account the guidance which appeared evant: see section 3(3) of the 1995 Act. The tribunal had expressly decided to disregard the Guidance on basis that it did not reflect current society. In doing so, it erred in law. It was for Parliament through the retary of State to keep under review the appropriate boundaries of disabilities and not for individual ployment tribunals to decide that the existing Guidance no longer reflected current society. Paragraph of the Guidance made it clear that "playing a particular game" was not to be regarded as a normal day-day activity, and in its context it was clear that the Guidance was not referring to playing a game to a ticularly high level. If a person suffered from such an impairment of their mobility that they were able to engage in any "normal endeavours at fitness" then the likelihood must be that they were disabled. wever, the fact that they were unable to do so by engaging in a particular sport or game did not make t sport or game a "normal day-to-day activity". Assuming as correct, for the sake of argument, that the ounal's unlikely finding that keeping goal and playing snooker were "normal endeavours at fitness", they re none the less to be disregarded as "normal day-to-day activities" because of the terms of the idance. The same applied to cycling. It might be that there was material before the employment ounal on which they could properly have found that, by reasons of the restrictions on his mobility, the ployee was disabled. Unfortunately, on the findings as made in the extended reasons, it was impossible say whether or not that was the position, and the proper course was to remit the matter to be reheard ore a fresh panel.

Coca-Cola Enterprises Ltd v Shergill; 2 September 2002; EAT/3/02
EAT: Judge Reid QC, Mr J C Shrigley and Mr G H Wright

SABILITY

At a preliminary hearing to determine whether an applicant employee was a disabled person within the aning of section 1(1) of the Disability Discrimination Act 1995, an employment tribunal heard evidence m a medical expert, instructed jointly by both parties, who concluded that, whereas the employee had l two transient periods of depression which amounted to mental impairment, they had not had a stantial or long-term effect on his day-to-day activities. The tribunal found that during both periods of oression the employee's inability to concentrate at work, and his consequent demotion, amounted to a stantial adverse effect relating to his normal day-to-day activities, that the two episodes were to be ced by reason of section 2(2) of and Schedule 2 to the 1995 Act so as to be treated as having a long-term ct, and that he was a disabled person.

NELSON J, allowing an appeal by the employer, said that the tribunal's reference to Schedule 2 showed t it had been approaching the case on the basis that it was one of past disability. The tribunal's lerstanding that paragraph 5 of Schedule 2, relating to section 2(2), enabled two instances of the same blem causing a substantial adverse effect to be linked so that they could be treated as having a long-term ct was incorrect. It suggested that the tribunal had not appreciated that past disability must itself have l a substantial and long-term adverse effect. The tribunal's misunderstanding amounted to an error of . It was not possible to know what influence that error had had on the decision as a whole but it was bable that it had prevented the tribunal from properly analysing the evidence before them. The tribunal l not, for example, examined each period of depression in order to ascertain how long it had lasted. us the tribunal had not explained whether by "transient" the tribunal, or the medical expert, meant that depression was transient within each period of depression or whether it lasted throughout each period, whether there was a constant underlying state of depression with two islands of symptoms. It was not refore possible to know whether the first period of depression came within the definition of "long-term" not. The decision itself did not suggest that the tribunal was intending to find that there was an lerlying condition of depression with islands of symptoms; nor was there any clear medical evidence that there was such an underlying condition. Without such a finding, however, it was difficult to see h the second episode of depression could properly be said to amount to a recurrence of the earlier conditi Though it was for the tribunal to decide whether or not adverse effects were substantial, where, accordance with his joint instructions, a doctor dealt with the issue of substantial adverse effect and fou no such effect, one would expect the tribunal to comment if it was disagreeing with that opinion, unles was unaware that it was disagreeing. The tribunal had failed properly to analyse the evidence and explain its decision. The only appropriate course was for the matter to be reheard by a fresh panel.

HSBC Bank plc v Clarkson; 29 October 2002; EAT/205/01
EAT: Nelson J, Mr P M Smith and Mrs R A Vickers

DISCLOSURE

An employee presented an originating application complaining of unfair dismissal and ra discrimination, in which he referred to an independent report commissioned by the employer investigate, inter alia, an allegation by the employee that he had been the subject of bullying. T employment tribunal ordered disclosure of the report.

MAURICE KAY J, dismissing an appeal by the employer, said that the employer first submitted that t employment tribunal had applied the wrong test to the question of whether or not disclosure ought to ordered and that the correct test was two-stage: first, was the document relevant? If so, second, was i disclosure necessary for the fair disposal of the case? It was said that the employment tribunal had applied test of relevance alone and had not addressed the further crucial test of necessity. That was not correct. was clear that the employment tribunal had been convinced that a fair hearing (which was synonymo with the fair disposal of the case) required that the relevant material in the report be disclosed. Althoug the word "necessary" was not used, the language used was equivalent to the test as the employer ha identified it. The second ground of appeal was essentially a perversity argument. The decision to ord disclosure had been taken in the light of an appraisal of the contents of the report, which the tribunal ha read with the consent of both parties. The employer acknowledged that it was impossible for the appe tribunal to say that the employment tribunal's assessment of the report was in itself perverse, as the appe tribunal had not seen the report. That caused the employer to submit that no reasonable tribunal coul have ordered disclosure, and that submission was rejected. The third ground of appeal was that th employment tribunal decision included express references to a number of authorities which had not bee cited or referred to in the course of the hearing. The propositions included in the decision and based on th authorities were self-evident and incontrovertible. Moreover, the reason for the decision to orde disclosure was not to be found in one or more of those propositions but in a different passage. The issu was whether the correct test was applied. In the judgment of the appeal tribunal, the test that was applie was entirely consonant and consistent with the correct test. There was no error in the reference to th authorities. A further point raised by the employer concerned the tribunal's comment that it was "no possible to understand accurately the recommendations and planned actions without reading the finding which gave rise to them" which raised the question as to whether, following its reading of the report, th employment tribunal ought to have invited further submissions on that subject. The answer had to be in the negative. Moreover, only one side would have been in a position to make such submissions as the employee's counsel had not seen the document. It had been suggested that the appeal tribunal might like to give some general guidance, but the circumstances of the present case were highly specific.

Hackney London Borough Council v Joseph; 4 July 2002; EAT/1260/01
EAT: Maurice Kay J, Mr D J Jenkins and Mrs J M Matthias

STRIKING OUT

An applicant's originating application made complaints of sex and race discrimination and breach of contract against both his employers and the employment agency who had placed him with the employers. The applicant, who was from New Zealand, alleged, inter alia, that when he complained to the agency of sexual harassment by his supervisor he was told that as a "traveller" many people in his position had to put up with worse and he should be grateful. The employers wrote to the employment tribunal seeking to strike out the originating application under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the proceedings had been scandalous, frivolous or vexatious, citing abusive phone calls from the applicant's fiancee and alleging a vendetta to secure maximum publicity and compensation. The applicant had received no notice of that application when he attended a hearing for "case management" directions which commenced with an application by both respondents to strike out and the production of a 200-page bundle. The chairman granted the application, stating, inaccurately, that the applicant had been forewarned. She found that the race claim had "no potential for success", since "traveller" was not seen as referring to a person from New Zealand and that the only purpose in bringing the case appeared to be vexatious, and, accepting the employers' evidence as to the abusive telephone calls, she found that the proceedings had been conducted in a vexatious and scandalous way.

MRS RECORDER COX QC, allowing an appeal by the applicant, said that it was clear that the
plicant had not had any notice that the strike-out application was going to be made. The chairman had
ught to rely on rule 13(3) on the basis that a tribunal was not required to give written notice if the party
as given an opportunity to show cause orally why the order should not be made. No reference, however,
that rule appeared in her decision, because she had proceeded, erroneously, on the basis that the
plicant had been forewarned. In any event, reliance on rule 13(3) was not appropriate where the
ounds of the application concerned conduct occurring some time before the application was heard, or
curring over a period of time. In such circumstances it was important to ensure that a party called on to
swer accusations about such conduct had proper notice and was able properly to prepare to defend
nself. The opportunity to show cause orally had to be an adequate opportunity. The applicant could not
said to have had an adequate chance to respond to the application, even allowing for the facts that many
the documents in the bundle had already been disclosed and that the chairman had allowed the
plicant's representative 25 minutes before requiring him to respond. In addition, the chairman had erred
having regard to matters on the tribunal file relating to a dispute between the applicant and the tribunal
aff. Accordingly, there had been an improper exercise of the chairman's discretion to proceed to hear the
plication. Turning to the striking out of the racial discrimination claim under rule 13(2)(d), in *Care First
rtnership Ltd v Roffey* [2001] ICR 87 the Court of Appeal held that an employment tribunal had had no
risdiction under the 1993 Rules to strike out the applicants' claims at the start of the hearing on the
ound that they stood no reasonable prospect of success. In *Balamoody v United Kingdom Central
ouncil for Nursing, Midwifery and Health Visiting* [2002] ICR 646 the Court of Appeal distinguished
ses where there was no reasonable prospect of success from those which were on any footing bound to
il, which could properly be said to be "frivolous" or "vexatious" such as to found jurisdiction to strike
t under rule 13(2)(d). The respondents submitted that the racial discrimination complaint was a claim
nich could properly be said to have no chance whatever of success and was therefore properly struck out.
e appeal tribunal did not accept that. The chairman had dealt with the word "traveller" as bearing only
e meaning, namely gipsy. The meaning relied on by the applicant related to Australasian migrant
orkers and was, he maintained, often used to describe workers like himself, working here on temporary
bs. The precise words used and their meaning were matters of evidence to be considered at the hearing.
s emphasised in *Anyanwu v South Bank Student Union* [2001] ICR 391, discrimination cases should not
struck out save in the plainest and most obvious cases.

Catton v Hudson Shribman; 10 October 2002; EAT/111/01
EAT: Mrs Recorder Cox QC, Ms N Amin and Mr D Chadwick

RIKING OUT

An employment tribunal ordered an applicant's claims of race and sex discrimination against her
nployers to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on
e ground that the applicant's solicitor's failure to comply with directions for the hearing of preliminary
ues amounted to scandalous conduct of the proceedings.

MR RECORDER BURKE QC, allowing an unopposed appeal by the applicant, said that the
plicant's solicitor had plainly failed in his duty to ensure that the directions were complied with. It was
t sufficient for a solicitor, even a sole practitioner, to say that he had not had enough time to do the work.
ough the appeal tribunal would hesitate long before interfering with the exercise by an employment
bunal of its discretion, even apart from making a number of important errors, the employment tribunal
d failed to approach its consideration of whether to exercise the power to strike out under rule 13(2)(e)
rrectly in law. The starting point had to be whether the conduct of the applicant's case had been
andalous. In *Bennett v Southwark London Borough Council* [2002] ICR 881 the Court of Appeal had
dressed precisely that topic and concluded, at para 27, that "scandalous" did not, in the modern world,
ean shocking but embraced "two somewhat narrower meanings: one is the misuse of the privilege of legal
ocess in order to vilify others; the other is giving gratuitous insult to the court in the course of such
ocess". That was a direct and binding exposition of the contemporary meaning of "scandalous". Had
e tribunal had the judgments in *Bennett* in front of them, they would necessarily have come to a different
nclusion as to whether the solicitor's conduct was scandalous within the correct meaning of that word in
le 13(2)(e). The conduct of the applicant's solicitor, however disappointing and open to strong criticism,
d not amount to a misuse of the legal process in order to vilify others and did not amount to gratuitous
sult to the court, and the tribunal was wrong in law to conclude that it was scandalous. Furthermore, the
bunal appeared to have proceeded on the basis that the solicitor's conduct was such that it should strike
t by reason of that conduct without consideration of any other matters. Before a tribunal could, as a
atter of law, strike out on the basis that there had been scandalous conduct under rule 13(2)(e), or under
replacement in the 2001 Rules, it had to consider, in addition to the degree of the shortcomings under
rutiny, whether a fair trial of the issues was nevertheless possible: *De Keyser v Wilson* [2001] IRLR 324,
ra 24. In the current context it was essential for a tribunal which was considering a strike-out on the
sis of scandalous conduct to consider whether, despite that conduct, a fair trial could nevertheless be
hieved and to balance any risk that a fair trial could not be achieved against the seriousness of the
nduct under examination. If the tribunal had asked itself that question there could only have been one

answer, namely that a fair trial was possible. Further, *Bennett* also decided that, before striking out in th face of scandalous conduct, a tribunal had to consider whether striking out was a proportionate respons to the conduct. Though it was possible that that part of the decision in *Bennett* was obiter, it appeared t be plainly right, and the tribunal in the present case had not considered proportionality at all.

Ogunleye v Greater Manchester Probation Committee; 2 September 2002; EAT/817/01
EAT: Mr Recorder Burke QC, Ms K Bilgan and Mrs A Gallico

IPLOYMENT TRIBUNAL

By a majority decision, an employment tribunal dismissed an employee's claim of indirect sex crimination on the ground that the employers' refusal to allow her to return to part-time working after birth of her child was justified within the meaning of section 1(1)(b)(ii) of the Sex Discrimination Act 75.

JUDGE PETER CLARK, allowing an appeal by the employee, said that the correct approach to the estion of justification for the purposes of section 1(1)(b)(ii) was set out in *University of Manchester v ies* [1993] ICR 474, 497–498, and *Allonby v Accrington and Rossendale College* [2001] ICR 1189, 01, para 29. The employment tribunal's reasons did not demonstrate that it had adopted that approach. st, there was nothing to indicate that the tribunal had considered the quantitative and qualitative effect the requirement for full-time legal secretaries in the employers' personal injuries department on women ected by it. That was a pre-requisite for the necessary balancing exercise, taking into account also the eds of the employers which were, by contrast, fully set out in the tribunal's reasons. Secondly, no empt was made to explain how the minority member reached his or her dissenting opinion. The appeal ounal would adopt the words of Phillips J in *Parkers Bakeries Ltd v Palmer* [1977] IRLR 215, para 11: here there is a majority decision it is very desirable that the views of the majority and those of the nority should be set out clearly and distinctly in separate paragraphs. Unless that is done neither the ties nor the appeal tribunal can really get a clear idea of precisely what are the views of the majority and nority respectively.” *Palmer* was a comparatively straightforward unfair dismissal case. The desirability the majority and minority views being clearly and fully expressed in the tribunal's reasons was, if ything, greater in a case such as the present where the tribunal was required to carry out a careful ancing exercise between the extent of the detriment to employees on the one hand and the needs of the ployers' business on the other. The decision would be set aside and the whole case remitted to a fresh ounal for rehearing.

Fox v Betesh Fox & Co Solicitors; 7 October 2002; EAT/363/01
EAT: Judge Peter Clark, Ms G Mills and Mr J C Shrigley

IPLOYMENT TRIBUNAL

After an eight-day hearing an employment tribunal dismissed an employee's complaints of, inter alia, e discrimination and unfair dismissal.

JUDGE SEROTA QC, dismissing an appeal by the employee made on the ground, inter alia, that he had en denied a fair hearing because the tribunal chairman had repeatedly fallen asleep during the course of hearing, said that the employee had made nine specific allegations before the employment tribunal ich, with the exception of one, had been set out in the extended reasons, investigated and rejected on the ts. There was no evidence to justify the suggestion that the employment tribunal had misconstrued the dence. It had correctly directed itself and made findings which could not be disturbed on appeal. The plicant had suggested that the chairman was asleep during some of the evidence of one witness, but it s apparent that the chairman had made a note of that evidence. The employee's representative said that had been embarrassed to raise the question of the chairman dozing off as he was unwilling to prejudice client's case by upsetting the chairman, and he sought to distinguish *Red Bank Manufacturing Co Ltd v adows* [1992] ICR 204 on the grounds that the conduct there was that of a lay member, not the irman, and that the member had been questioned at the time and given an explanation. However, those tters formed no distinction at all. It was quite wrong, if the employee was correct, that the chairman's nduct should have extended throughout the eight days of the hearing without any complaint being made he tribunal. A litigant could not be permitted to allow conduct such as that alleged to continue on the is that, if the decision was in his favour, he would take no action, but that there was a ground of appeal he decision should go against him. If an advocate in an employment tribunal considered a member of tribunal was dozing or failing to attend, he had a duty to draw that to the attention of other advocates l to raise it with the chairman at once. The duty of an advocate to a client, and to the tribunal, had to vail over any personal embarrassment. If the conduct complained of was seen by both advocates, the estion of embarrassment should not arise. If the matter was raised at the time it could be dealt with propriately by the tribunal, and, if there was substance in the complaint, the employment tribunal might e to order a rehearing. Unless matters such as were complained of in the present case were raised at the e, as Tucker J made clear in *Red Bank Manufacturing Co Ltd v Meadows*, they would not be ertained by the appeal tribunal.

Mayers v Corporation of London; 10 December 2002; EAT/812/00
EAT: Judge Serota QC, Miss C Holroyd and Mr A D Tuffin

EQUAL PAY

Women hostel workers employed by a city council applied for equality of pay with three male worke employed by the council at another hostel. An employment tribunal directed that a material factor defen under section 1(3) of the Equal Pay Act 1970, raised by the council, should be taken as a preliminary issu and that issue was determined against the council.

JUDGE PETER CLARK, allowing an appeal by the council, said that on the face of section 1(3) th material factor defence differed depending on whether the claim for equal pay was based on like work o work of equal value. In the former case (section 1(3)(a)) there *had to be* a material difference between th woman's case and the man's. In the latter (section 1(3)(b)) there *might be* a material difference. It followe that a necessary pre-condition to determining whether the section 1(3) defence was made out was to decid whether the applicant's case was properly based on like work or work of equal value. The present cas provided an example of a point which ought not to have been taken as a preliminary issue. The appea tribunal would proceed on the assumption that the case was a like work case, since below the council ha accepted that the relevant test was that adumbrated in *Glasgow City Council v Marshall* [2000] ICR 19 applying *Strathclyde Regional Council v Wallace* [1998] ICR 205, which were both like work cases Applying the guidance in those cases, the test for an employer seeking to establish the section 1(3)(a defence was: (1) was the employer's explanation or reason for the difference in pay genuine and not sham? (2) Was the less favourable treatment of the applicant due to that reason? The factor had to b significant and relevant. (3) The reason must not be the difference of sex. (4) In a like work case the facto relied on had to be a significant and relevant difference between the woman's case and the man's case. Th employment tribunal had answered the first three questions adverse to the council and made no finding on the fourth question. In relation to the first question, the appeal tribunal had carefully considered the tribunal's reasons but were unable to discern what it was about the council's reasons, good bad or indifferent, that was said to be other than genuine. The second question raised an issue of causation Justification was irrelevant at that stage, and the tribunal had fallen into error in considering the question of justification at the causation stage. On the third question, it was for the tribunal to determine whether in fact a disproportionate impact on women amounting to prima facie indirect sex discrimination was present in the difference in treatment and, if so, to determine whether the council had justified the less favourable treatment; alternatively, whether the less favourable treatment was directly discriminatory, in which case the question of justification also arose in the context of equal pay. Neither question had been addressed by the tribunal. Accordingly, the tribunal's reasoning that the material factor defence had not been made out could not stand.

Carlisle City Council v Bulman; 2 December 2002; EAT/1120/01
EAT: Judge Peter Clark, Mr P A L Parker and Mr S M Springer

ESTOPPEL

A local authority employee was summarily dismissed for gross misconduct following the application of a new disciplinary procedure. Under the old procedure he would have been entitled to a hearing by councillors; and, on a complaint of unfair dismissal by the employee, an employment tribunal found that the council had had no right to impose the new procedure, that failure to provide a hearing by councillors would be a fundamental defect which might well have affected the result, but that the employee was estopped from relying on the old procedure. The tribunal found that the dismissal was fair and dismissed the complaint.

JUDGE PETER CLARK, allowing an appeal by the employee, said that for the equitable doctrine of estoppel to operate there had to be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he would not enforce against the other his strict legal rights arising out of the relationship; an intention on the part of the former that the latter would rely on the representation; and such reliance by the latter party. In the present case the necessary legal relationship existed. Had the employee promised or represented that he would not enforce his strict legal rights against the council in the form of the old procedure, it being common ground that he had not agreed to the new procedure, intending the council to rely on that representation? The representation did not need to be express but it had to be clear and unequivocal. Further, it had in some way to have influenced the conduct of the council. It was not correct to say, on the undisputed evidence, as did the tribunal in their reasons, that at no point had the employee's advisers challenged the application of the new procedure. Although their challenges had not been directed specifically at the procedure as a matter of contract, it was absolutely clear that the employee was not silent on the matter and had protested. The tribunal had erred in so far as they implicitly found that the employee had made a clear and unequivocal representation to the council that he would not seek to rely on his contractual right to the old procedure. Further, there was no evidence before the tribunal that the council had acted in reliance on any representation made by the employee. Accordingly, the tribunal had fallen into error in finding that the employee was estopped from relying on the old procedure, and the case would be remitted for rehearing before a different tribunal.

Lee v Bristol City Council; 30 October 2002; EAT/536/01
EAT: Judge Peter Clark, Mr C Edwards and Mrs J M Matthias

SCONDUCT

An employee accused of bullying and intimidation was refused the opportunity to cross-examine the kers of statements against her. The employer's panel conducting the disciplinary hearing read the ements, which the employee claimed were "a pack of lies" the makers had been coerced into making. panel adjourned the hearing and saw the witnesses, who confirmed their statements and denied that y had been coerced. The panel formed the view that the witnesses were terrified of the applicant and t she was guilty of gross misconduct. She was dismissed and her complaint of unfair dismissal was cted by a majority of the employment tribunal.

WALL J, dismissing an appeal by the employee, said that the function of cross-examination in the ensic context of civil proceedings was to test the credibility of witnesses as part of a fair hearing in which h party's case was put to the other, with the object of the tribunal deciding, on the balance of babilities, who was telling the truth and what, factually, occurred. Section 98 of the Employment hts Act 1996 did not require a dismissing employer to be satisfied that the employee whose conduct was estioned had actually done what he was alleged to have done. It was sufficient for the employer to have a uine belief that the employee had behaved in the manner alleged, to have reasonable grounds for that ief and to have conducted an investigation which was fair and proportionate to the employer's capacity l resources. The employer had to act fairly but fairness did not require a forensic or quasi-judicial estigation. To a lawyer, cross-examination designed to undermine credibility would appear the natural y of testing whether witnesses were telling the truth, but it did not follow that an employer was bound to e the same course. The question for a tribunal hearing an unfair dismissal claim was whether in all the cumstances the investigation as a whole was fair. There was no rule of law that rendered it incumbent an employer to arrange a hearing which gave the employee the opportunity to cross-examine the person king a complaint: *Ulsterbus v Henderson* [1989] IRLR 251, para 21, though that case did not lay down t cross-examination could never be required in any investigation carried out by a reasonable employer. question in each case was whether the employer fulfilled the test in *British Home Stores Ltd v Burchell* 80] ICR 303, and it was for the employment tribunal to decide whether the employer had acted sonably and whether the process had been fair. In the instant case the tribunal had directed itself propriately within the framework of section 98(4) and the conclusions of the majority could not be llenged. It was, however, unfortunate that the employer did not give reasons for its refusal to allow the ployee to cross-examine the complainants. It was also unfortunate that the disciplinary panel, when y re-interviewed the complainants, did not put to them all the matters raised by the employee at the ciplinary hearing. A different employer might have taken the view that fairness required cross-mination of the witnesses, but the procedure adopted by the employer in the instant case was within the d of reasonable options.

Santamera v Express Cargo Forwarding (t/a IEC Ltd); 26 November 2002; EAT/780/01
EAT: Wall J, Lord Davies of Coity and Mr D J Hodgkins

ACTICE

An applicant employee's complaint of unfair dismissal was adjourned at his request for health reasons l was re-listed. Six days before the new date the applicant requested a further adjournment, claiming t he had only then heard of the re-listed hearing. The adjournment was refused, though the applicant s told that if the employment tribunal were satisfied that he had not received the notice of hearing the e would be postponed. The applicant did not attend the hearing, and the tribunal dismissed the claim ler rule 9(3) of the Employment Tribunals Rules of Procedure 1993 "for his non attendance".

MS RECORDER SLADE QC, allowing an appeal by the applicant, said that rule 9(3) gave an ployment tribunal a discretion to dismiss or dispose of a case in the absence of a party, but, before rcising that discretion, the tribunal had to consider the material produced by the party who was absent. at consideration was material to the exercise of the discretion and also to the decision as to what was to done on any disposal. In the present case the tribunal had before it a claim for unfair dismissal. The missal was admitted and in those circumstances the burden of proof was on the respondent employer to ablish the reason for dismissal and to show that it was an admissible reason. Thereafter the inquiry as to ether the dismissal was fair attracted no burden of proof on either party but was a matter to be decided the tribunal on the evidence before it. In the judgment of the majority of the appeal tribunal, the ployment tribunal did not give adequate reasons for its decision to take the course of dismissing the ginating application. The reasons for so doing, such as they were, indicated that the reason for taking t course was the non appearance of the applicant. While the reasons recorded that the originating plication had been considered, they gave no indication as to why, having considered the originating lication and other documentation, the tribunal considered it appropriate to adopt the course of missing the application without disposing of it by other means such as inviting the employer to lead its dence and make submissions. The documentation referred to by the tribunal did not provide an obvious wer as to why the application should be dismissed. The requirement in rule 9(3) for "due sideration" was a statutory pre-condition to the exercise of the discretion and, since the requirement was there in the rule, proper consideration had to be given to the documents there referred to. The ca would be remitted to a different tribunal for hearing.

Roberts v Skelmersdale College; 25 September 2002; EAT/1094/01
EAT: Ms Recorder Slade QC, Mr D Smith and Mr P M Smith

MPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal, following a failure to sult her during a reorganisation when she was made redundant, but awarded no compensation on the und that she would have been dismissed in any event.

JUDGE McMULLEN QC, allowing an appeal by the employee and remitting the issue of remedy, said t it was clear that at the hearing and in written submissions no one had directly turned their attention to *Polkey* process and that no opportunity was given for the employee to argue against the 100% uction of her compensation, though the tribunal did have evidence on which it could come to a clusion. The evidence before the tribunal included an appendix to the applicant's witness statement ich set out a comparison between her past experience and her suitability for a newly created post and employee's initial application to the employers in which she indicated her experience. The employee tended that, in the light of that evidence, it was perverse of the employment tribunal to find that it was employers' bona fide and reasonable conclusion that the employee did not meet the relevant criteria for new post. Since the objective standard was imported by the word "reasonable" it was possible for the eal tribunal to examine the materials put before the employers and then before the tribunal. Given that appeal tribunal had seen that the employee had relevant experience, it was not correct for the ployment tribunal to draw the conclusion that the employers had reasonable grounds for the conclusion t she did not, and the employee's appeal was, accordingly, well founded. The real problem had urred in the assessment thereafter based on that finding of the employee's chance of surviving in the ployers' organisation. The approach taken by the tribunal, not expressly on *Polkey* but on a *Polkey* roach, had been taken without any submissions. There would be some situations where one could say t what had gone wrong was merely "procedural", and others where one could say that an employee had n deprived of something of "substantive" importance, to use the phrase of Lord Coulsfield in *King v on Ltd (No 2)* [1998] IRLR 686. While in many cases it might be inappropriate to allocate the facts to ier category, the distinction would often be of some practical use in considering whether it was realistic mbark on an attempt to construct the hypothesis enabling one to assess what would have happened. If lapse was merely procedural it might be relatively straightforward to envisage the course of events, ereas it might well be more difficult if what had gone wrong was more fundamental. In *O'Dea v Chemicals Ltd* [1996] ICR 222, 234–235, the Court of Appeal was critical of the distinction drawn ween "substantive" and "procedural". The Court of Session in *King*, while not expressly departing n it, appeared to have adopted as helpful the distinction which it set out in para 19. The appeal tribunal uld follow the later Scottish case.

Donovan v Centrepoint Soho; 17 October 2002; EAT/1172/01
EAT: Judge McMullen QC, Mr K Edmondson and Miss D Whittingham

CLOSURE

An employment tribunal chairman refused an application by two applicant employees for an rlocutory order for the production of documents under rule 4(5)(a) of the Employment Tribunals Rules Procedure 2001, in relation to their unfair dismissal complaints, on the ground that the documents ght were unlikely to be relevant. The chairman refused to reconsider his decision and the employees uested extended reasons for the purpose of an appeal. Without providing reasons, a full tribunal, of its n motion, reconsidered the employees' application and, under rule 4(5)(a) and (b), required the ployers to allow inspection of a number of documents.

BURTON J (President), allowing an appeal by the employers, said that there was no automatic power eview any order of a tribunal. If every order of any kind could be reviewed, employment tribunals uld never be able to go forward. An order which was, in effect, a requirement under rule 4(5)(a) was not kind of order which was the subject matter of review under rule 13. That was not to say that such an lication for discovery or inspection could not be renewed, once having been refused, but the ordinary nciples requiring some fresh circumstances would be required; a review was not available. In so far as employment tribunal, in response to the request for extended reasons, had simply listed the original lication once again and looked at it again, albeit with a full tribunal rather than a chairman alone, there no power or jurisdiction to do so. The situation was, however, different so far as concerned 4(5)(b). There had been no previous application under rule 4(5)(b) for disclosure and inspection ore the hearing. The decision under rule 4(5)(b) was one made by the tribunal of its own motion and one for which there was, on the face of it, jurisdiction. It was submitted that the way in which the sdiction and power under rule 4(5)(b) should be exercised by a tribunal was by reference to rule 31 of Civil Procedure Rules and the Practice Direction thereunder; that that required that no such order uld be made without specific evidence in support; and that in the present case there was no such dence. It appeared to the appeal tribunal that what was meant by the reference to CPR r 31 was simply to refer to the power and jurisdiction to make such orders, for example, for standard discovery and f specific discovery as described in the CPR and not to the procedures laid down in the Practice Directio which were not referred to. In any event, the power in question was a power of the tribunal to make order of its own motion, not on the back of an application that was or could have been supported witness statements. Nevertheless, in making an order, even of its own motion, a tribunal would want a need to pay regard, not only to the well established practice in the High Court, but also to the overridi objective set out for employment tribunals in regulation 10 of the Employment Tribunals (Constitutio and Rules of Procedure) Regulations 2001. It would, therefore, need to be satisfied that the documen were squarely relevant and that what was being sought was both relevant and proportionate. What ha been ordered in the present case was not proportionate. Further, in the present case the order should ha been not for inspection but for disclosure. However, in the ordinary case, once disclosure had been mad inspection ought to follow as a matter of course, and contested applications for inspection after an ord for disclosure should be rare in the extreme and carried out at risk as to costs in respect of parties taking a inappropriate objection to inspection. It was open to the applicant to make a fresh application und rule 4(5)(b) supported by an appropriate statement and seeking much more particularised documents.

Ken Read & Son Ltd v Dawson; 11 November 2002; EAT/287/02
EAT: Burton J (President), Mr D A C Lambert and Mrs R A Vickers

MISCONDUCT

An employee who was dismissed for accessing pornography on the internet at work using the compute with which he was provided had his complaint of unfair dismissal upheld by an employment tribunal.

MISS RECORDER SLADE QC, allowing an appeal by the employer, said that the tribunal found tha the employer had a genuine belief in the misconduct, that that belief was founded on reasonable ground and that a reasonable investigation had been carried out by the employer. While it had set out the correc approach to the question of whether the dismissal was fair in all the circumstances, the tribunal had, non the less, considered for itself whether the conduct should be categorised as misconduct or gross misconduc and approached the question of the fairness of the dismissal by considering what it considered to be th proper categorisation rather than by considering whether the employer's categorisation of the conduct a gross misconduct was within the band of reasonable responses. The tribunal was faced with a claim abou which the facts were not in dispute. The tribunal had found that the constituent requirements as set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 were made out, and the only judgment it had to make was whether the sanction of dismissal was within the band of reasonable responses of the reasonable employer. If a correct approach had been adopted, no reasonable employment tribunal would have come to a conclusion other than that dismissal was within the band of reasonable responses of the employer.

Hillingdon London Borough Council v Thomas; 26 September 2002; EAT/1317/01
EAT: Miss Recorder Slade QC, Mr R Thomson and Mr P D Wickens

PRACTICE

An applicant and her solicitor failed to attend an interlocutory hearing before a tribunal chairman at which directions for the future conduct of her complaint of disability discrimination were given and a hearing date fixed. On receiving the directions order, the applicant's solicitor requested a review on the ground that they had not received notice of the directions hearing and that the applicant's medical expert was not available on the date fixed. The chairman refused to relist the case for further directions on the basis that the notice of hearing had been properly sent.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the critical question, never addressed by the chairman, was whether the applicant's solicitor had received notice of the directions hearing. While it was correct to say that a notice of hearing properly sent was deemed to be good service, that presumption might be rebutted where the contrary was proved by the deemed recipient. In the case of a decision (as opposed to an order) the decision would be reviewed if the outcome was proved: see *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249 and the cases there cited. The same principle applied where it was sought to have an order of the tribunal, not a decision, altered, varied or revoked. The applicant's solicitor had given evidence on oath that his firm had not received the notice of hearing. Accepting that evidence, the applicant's solicitor had not attended the directions hearing because he had not received notice of it, and in his absence there was no agreement as to the hearing dates fixed by the chairman. Had he attended he would have ensured that the dates fixed were dates on which the applicant's medical expert would have been available. The error on the part of the chairman was in not inquiring into the applicant's representative's contention that he had not in fact received notice of the directions hearing.

Mackintosh v Anchor Trust; 4 December 2002; EAT/1121/02
EAT: Judge Peter Clark

TRIKING OUT

An employment tribunal ordered an employee's originating application, complaining of unfair ismissal and race discrimination, to be struck out under rule 13(2)(e) of the Employment Tribunals Rules f Procedure 1993 on the ground that the manner in which the proceedings had been conducted on her ehalf had been scandalous, frivolous or vexatious following, inter alia, interventions by her lay epresentative when the employee was being cross-examined.

WALL J, dismissing an appeal by the employee, said that the absolute right to be represented by the ndividual of their choice was one of the well established rights which applicants enjoyed as part of their ider right to free access to employment tribunals. In *Bache v Essex County Council* [2000] ICR 313, the ourt of Appeal clearly enunciated the rule that the right to a representative of choice was an unqualified ght and was not therefore affected by regulations designed to ensure that the tribunal had power to ontrol its own proceedings. Where an applicant before the tribunal was represented by a person who did ot belong to any professional body and that person misbehaved, the tribunal's powers in relation to the ndividual concerned were limited. There was no professional sanction that could be invoked. There was o body to whom the offending representative could be reported. The applicant had an absolute right to be epresented by the person concerned. Regrettably, therefore, if repeated warnings about the manner in hich the proceedings were being conducted had no effect, the only sanction the tribunal had was the ltimate one of striking out the applicant's claim. A tribunal's reluctance to take that course was self vidently understandable. It meant that the case was not heard on its merits. The applicant might have an rguable case which was entirely obscured, and its presentation frustrated, by the manner in which it was onducted by the applicant's representative. It was for that reason that an originating application should nly be struck out, under what was now rule 15(2)(d) of the Employment Tribunals Rules of Procedure 001, if the manner in which the proceedings were being conducted on the applicant's behalf made it npossible for the tribunal to do justice between the parties. The employment tribunal had not had the dvantage of the guidance given by *Bennett v Southwark London Borough Council* [2002] ICR 881, which ad not been heard by the Court of Appeal until a year later, but its approach had been entirely consistent ith the judgment of Sedley LJ at p 891, paras 26–29. The tribunal had been right to allow the employee n opportunity to dispense with the services of her representative. She had declined to do so. She must ave been aware of the consequences of her action. The appeal tribunal were in no doubt that the mployment tribunal was entitled to come to the view that the behaviour of the applicant's representative ad rendered a fair assessment of the employee and her case impossible. The strike out was a regrettable ut entirely proportionate response.

Edmondson v BMI Healthcare; 26 November 2002; EAT/654/01
EAT: Wall J, Mrs J M Matthias and Mrs M T Prosser

IME LIMIT

The Registrar of the Employment Appeal Tribunal refused an application by an applicant for an xtension of time for appealing against a decision of an employment tribunal dismissing his complaint of nfair dismissal, where his notice of appeal had arrived from counsel by fax at the appeal tribunal just over ne hour after midnight on the last day for entering it.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that in *Abdelghafar v United Arab mirates* [1995] ICR 65, 69E, it was said that an appeal against the Registrar's refusal to extend time was onducted as a rehearing of the original application. In CPR r 52.11 the approach to be adopted in the civil ourts was to conduct appeals by way of review rather than a rehearing. The applicant submitted that ere was no warrant for extending that rule to the present statutory tribunal. The employer, while content adopt the view that a review was appropriate, had been careful to invite the appeal tribunal, in the lternative, to exercise its own discretion in accordance with the practice in *Abdelghafar*. Treating the atter as a review, the Registrar's exercise of discretion had not been shown to be wrong in law. More articularly, considering the arguments on the merits de novo would produce the same conclusion as the egistrar. While the degree of delay in lodging an appeal was a relevant factor, it was far from eterminative. It was not an acceptable reason for delay that the applicant did not receive the extended easons until five weeks as opposed to six weeks before the time for appealing expired. The point was ken that there was delay in the applicant's legal insurer's taxation specialist releasing the papers. It was ssential that the applicant's solicitor, if she was not to draft and lodge a notice of appeal herself, should ave obtained the papers from the taxation specialist and obtained authority from the insurer, at any rate, lodge an appeal. That was all left to the last minute and counsel was not instructed until two working ays before expiry of the limitation period. The cases had long counselled appellants and their advisers not wait until the last moment in case there was some delay, normally in the context of postal delays, but ere could be added the possibility of delays in getting through with a facsimile transmission. The plicant referred to the merits of the appeal. It was not a hopeless appeal, which would be a relevant ctor in favour of the respondent employer; but nor did the grounds of appeal raise a strong unanswerable ppeal. In those circumstances, as the Registrar (no doubt taking into account the guidance in *bdelghafar*) concluded, the merits were of little significance in the overall picture. A further matter was at a member of the appeal tribunal staff had indicated that applications for an extension of time should be made with the notice of appeal: see the amended rule 37(4) of the Employment Appeal Tribunal Rules 1993. That amendment did not appear, of itself, to overrule the guidance in *Abdelghafar*, at p 71E. Whether or not an application for an extension of time could be made and granted before the expiry of th limitation period for appealing, it seemed on the facts of the present case that the application was all of a piece with the last minute approach by the applicant's advisers. Had an application been made earlier and not dealt with, the point might have had some force, but made, as it was, the day before time expired did not materially alter the overall conclusion that no good excuse had been made out for an extension of time.

Stratford v West Lancashire District Council; 18 October 2002; PA/276/02
EAT: Judge Peter Clark (as in chambers)

PPEAL

On an appeal by an employer from an employment tribunal decision upholding claims by an employee r pay in lieu of notice and holiday pay, the employer sought to raise for the first time that the claims were t of time.

JUDGE ALTMAN, allowing the appeal, said that it was never argued before the employment tribunal, d that tribunal had not considered, whether the claims were out of time and, if so, whether it was asonably practicable for them to have been made in time and, if not, what the reasonable period would . There was a very well established body of judicial authority that the appeal tribunal should not tertain a point of law taken for the first time and not taken before the employment tribunal. The present se, however, concerned the exception to that principle, where what was being dealt with was an issue as jurisdiction. The Employment Rights Act 1996 made clear that the employment tribunal did not have risdiction to entertain a claim unless it was brought within a specified time or, if it was not reasonably acticable, within such other time as might be considered appropriate. Accordingly, the appeal raised an sue of jurisdiction, and it was right that the point should now be taken. The employee's claims for pay in eu of notice and holiday pay would be remitted to a fresh tribunal to determine whether they had been esented within three months of the effective date of termination of his employment and, if not, whether it ad been reasonably practicable to do so.

Landon v Lill; 14 November 2002; EAT/1486/00
EAT: Judge Altman, Mr T Haywood and Mr D J Jenkins

ONSTRUCTIVE DISMISSAL

An employee resigned following the rejection of his grievance about his annual appraisal and a decision y his employer to remove him from consideration for work in Australia. He made a complaint of unfair smissal, submitting that there had been a breach of the fundamental term relating to trust and confidence the low appraisal, the withdrawal of the consideration of him for Australia and the failure to investigate operly his grievance relating to those two matters. Dismissing his complaint of unfair dismissal on the ound that there had been no dismissal, an employment tribunal found that the failure to consider the nployee for Australia had been based on the employer's interpretation of four incidents touching on the nployee's attitude, including aggressive behaviour at a meeting, and that the employer's investigation had vered all those directly involved in the incidents and was fair.

JUDGE McMULLEN QC, dismissing an appeal by the employee, said that an employee was entitled to ccess to a grievance procedure: see *Goold v McConnell* [1995] IRLR 516, but what was seen at the time as radical approach by the appeal tribunal had quite limited scope. In the present case, none of the iticisms made by the appeal tribunal *Goold* applied. There was a grievance procedure, it was activated, it as prompt, it was the subject of an appeal. The criticism was of the employer's judgment as to the riousness of the incidents and of the quality of the employer's investigation. The standard against which vestigation should be judged was, in the present case at least, the band of reasonable responses. The ourt of Appeal had recently reaffirmed in *J Sainsbury plc v Hitt* [2003] ICR 111 that the band of asonable responses approach applied to the conduct of investigations as much as to other procedural and bstantive aspects of a decision to dismiss for conduct. That seemed to represent a slight lowering of the andards of fairness in an investigation of a disciplinary matter. Judged against the standards of a asonable employer, could it be said that no reasonable employment tribunal could have found that the ilure to investigate every single person at the meeting constituted a breach of the standards required of a asonable employer, such breach being of a fundamental nature entitling the employee to leave forthwith? ne criticisms made by the employee of the investigation by the employer fell well below that standard. ne employment tribunal had been fully alert to the employee's criticism and balanced the arguments, and had acquitted the employer in strong terms. There was no finding critical of the employee's evidence or vourable to the employer's evidence which was not supported by reasons. The tribunal had then ncluded that there was "no basis for asserting or alleging that the grievance procedure as a whole was ything other than fair, detailed and thorough". The tribunal had set out its reasoning perfectly lequately for that decision. It would be noted that, applying *J Sainsbury plc v Hitt*, that seemed to be a gher standard than was required. Nevertheless, the tribunal had accepted that the employer met that ry high standard and it followed that it would have done so at the lower standard which was applicable.

Hamilton v Tandberg Television Ltd; 12 December 2002; EAT/65/02
EAT: Judge McMullen QC, Mrs R Chapman and Mr M Clancy

CONSTRUCTIVE DISMISSAL

Following allegations of, inter alia, drunkenness, made by the managers of a public house, an employee went on sick leave and invoked his employers' grievance procedure. Believing that his employers were failing to deal with his grievance properly, the employee resigned. He made complaints of unfair dismissal and breach of contract. An employment tribunal found that, though the managers' conduct amounted to a fundamental breach of the implied term of mutual trust and confidence, the employee had not resigned in response to that breach and it dismissed his unfair dismissal complaint. The employment tribunal also found that, by failing to pay him sick pay and holiday pay and by changing his pay day, the employers were in breach of the contract of employment, but it did not consider the cumulative effect of those breaches in relation to the employee's claim that he had been constructively dismissed.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that it was submitted, inter alia, that the employment tribunal had erred in law in that there was no direction on the "last straw" doctrine, as enunciated by Glidewell LJ in *Lewis v Motorworld Garages Ltd* [1986] ICR 157, 169: "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" The employee further criticised the employment tribunal's decision in that it compartmentalised the claims for breaches of contract on the one hand and the dismissal claim on the other, when, in truth, they were interconnected, and he submitted that there was a failure to consider the final straw and the accumulation of grievances together. In the judgment of the appeal tribunal, the employment tribunal had made decisions about each individual aspect and considered only whether each amounted to a breach of contract. It had erred in failing to apply the more flexible approach enjoined by Glidewell LJ, which was to look at matters beyond simply breaches in order to determine whether there was a cumulation of acts, breaches or otherwise. It had also erred in deciding that, since the final event—the employee's claim to have his grievance addressed—was not a breach, there was no breach at all. The finding that the conduct of the managers invoked a breach of the term of trust and confidence was itself sufficient to find in the employee's favour that there was at least one breach of contract. Further, consistent with the tribunal's approach of segmenting its analysis of the events, it then went on to consider the other complaints made by the employee and found, in his favour, that there was a breach of contract in failing to pay him his relief pay and his sick pay, in making a unilateral change to his pay date and in failing to pay his holiday pay. It was inconsistent of the tribunal not to have included those findings within its general approach to the question of repudiation. Not only did they indicate conduct by the employer of an unacceptable nature, they were also breaches of the employment contract. When added to the other significant breach of the term of trust and confidence and the other events, categorised as less than a breach, they did constitute a series falling within the "last straw" doctrine. The appeal tribunal would substitute a decision that there was a dismissal, and, given a correct direction on the law as to all the acts and breaches of contract, the facts pointed ineluctably to a decision that the dismissal was unfair. Accordingly, the case would be remitted for a remedy hearing.

Warren v S & N Pubs and Restaurants Ltd; 29 October 2002; EAT/1376/01
EAT: Judge McMullen QC, Mr P Dawson and Mr D J Hodgkins

DISABILITY

An employment tribunal held, as a preliminary point, that an applicant employee, who had complained of disability discrimination by her employers, was not disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

MS RECORDER SLADE QC, allowing an appeal by the applicant, said that the expert evidence was that the applicant suffered from depression and abused alcohol. The majority in the employment tribunal had concluded that regulation 3 of the Disability Discrimination (Meaning of Disability) Regulations 1996, which provided for the purposes of the Act that alcohol addiction was excluded as an impairment, superseded paragraph 11 of the Guidance (on matters to be taken into account in determining questions relating to the definition of disability), which provided that tribunals should not have regard to the cause of a disability, even if that cause of itself would not amount to a disability or an impairment within the meaning of the Act, such as addiction to alcohol. Both the majority and the minority in the employment tribunal had erred in considering that there might be a conflict between the Guidance and the Act or the Guidance and the Regulations. The employment tribunal had erred in its approach, in that it was not material to a decision as to whether a person was suffering from a disability within the meaning of the Act to consider how the impairment from which they were suffering was caused. What was material was to ascertain whether the disability from which they were suffering at the material time was a disability within the meaning of the Act or whether, where it was relevant, as in the present case, it was an impairment which was excluded by the Regulations from being treated as such a disability. The tribunal's reasons indicated that, in its decision-making process, the tribunal had considered that it was important to understand what had caused the impairment from which the applicant was suffering at the material time.

nat betrayed an error of approach so serious that the decision could not stand. The case would be mitted for rehearing of the preliminary point.

Power v Panasonic UK Ltd; 17 September 2002; EAT/747/01
EAT: Ms Recorder Slade QC, Mr D J Hodgkins and Mrs M T Prosser

ISABILITY DISCRIMINATION

A teacher, who had been away from work for 10 months suffering from anxiety stress disorder, was smissed for the reason that the school believed that she had no intention of returning to work. An nployment tribunal, while finding that the school had so concluded because of the applicant's incapacity rough illness to return to work, dismissed her complaint of disability discrimination on the ground that, nce the reason for the dismissal was because the school believed she did not intend to return, the decision dismiss the applicant did not relate to her disability but to that decision.

MR RECORDER HAND QC, allowing an appeal by the applicant, said that in *Clark v Novacold Ltd* 999] ICR 951, 962, the Court of Appeal's concern with the correct interpretation of section 5(1)(a) of the isability Discrimination Act 1995 focused on the phrase "that reason". The court accepted the argument at the words "that reason" referred only to the first three words of paragraph (a)—"for a reason". It ould be helpful for employment tribunals to remind themselves when considering whether there had been ss favourable treatment of a disabled person "for a reason which relates to the disabled person's sability" that those words were there to "specify a link between the reason for the dismissal and [the] sability". Thus understood, it became more obvious that the relationship between the reason for the smissal and the disability did not need to be direct. To find that an employee had been dismissed because their disability would automatically place the employer in breach of section 4(2) and section 5(1)(a) of e Act, but to conclude that the reason for dismissal was not the disability did not mean that the nployee's case could be rejected without further inquiry; in such a case, it was necessary to ask whether e reason for dismissal had a relationship to the disability in the sense that it was linked to it. There was othing to suggest that the employment tribunal had considered, in terms of an examination of the nature the reason for the applicant's dismissal and the nature of her disability, whether there was a relationship link between them. The belief as to the applicant's intent arose from the circumstances of her continued osence due to her anxiety stress disorder; that disorder kept her from returning to work. Thus the two had relationship and were linked together. The tribunal's finding that the two were not related had to have oceeded from the erroneous perspective that the tribunal need not look any further than the aracteristics of the reason for the dismissal. The inevitable and only answer to the question whether the ason for the applicant's dismissal related to her disability was in the affirmative, and a finding to that fect would be substituted.

Shrubsole v Governors of Wellington School; 18 February 2003; EAT/328/02
EAT: Mr Recorder Hand QC, Lord Davies of Coity and Mrs D M Palmer

IPLIED TERM

An employment tribunal upheld an employee's complaint of unfair constructive dismissal, holding at, by making a request for him to take a drug test without any prior discussion or explanation, his nployers were in breach of the implied term of trust and confidence such that the employee had been titled to resign.

JUDGE PETER CLARK, allowing an appeal by the employers, said that the employers submitted that formulating the relevant implied term of mutual trust and confidence the employment tribunal had nitted an element, particularly material in the present case, to be found in the formulation expressly proved by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] R 606, 609, that an employer would not without reasonable and proper cause conduct itself in a manner ely to destroy or seriously damage the relationship of confidence and trust between employer and nployee. The critical element was that the employer's conduct had to be "without reasonable and proper use". In the present case it was arguable that the employers had reasonable and proper cause for quiring the employee to take a drug test. Whether or not they did have was a question the appeal tribunal uld not resolve and which had not been raised or answered below. The employment tribunal had fallen to error in their formulation of the implied term by omitting that material element from the House of rds' formulation. On that ground the appeal would be allowed and the matter remitted for rehearing. ne employers had also submitted that the employment tribunal ought to have gone on to consider hether, if there was a dismissal, it was fair. The appeal tribunal was bound by the reasoning in *Aparu v eland Frozen Foods plc* [2000] ICR 341 to conclude that, having failed to pursue before the employment bunal the alternative case that if there was a dismissal it was fair, that point could not now be raised, d, as the case was being remitted for rehearing on the constructive dismissal issue only, it would not be en to the employers to advance that alterative point at the rehearing.

Dolby Hotel Liverpool Ltd v Farley; 30 October 2002; EAT/1140/01
EAT: Judge Peter Clark, Mr D Chadwick and Mr G Mills

COSTS

On complaints by six female employees that their employers' proposal to replace flexi-time workin with fixed hours was discriminatory in that a considerably smaller proportion of women than men coul work full-time fixed hours because of childcare responsibilities, the employment tribunal found that th employees had failed to show that that requirement was a detriment with which they could not comply an that, even if the employees had established indirect discrimination, the employers had shown that th requirement was justifiable irrespective of sex. The tribunal further found that the employees had acte unreasonably in pursuing the proceedings and made costs orders against them.

JUDGE PUGSLEY, allowing an appeal by the employees against the award of costs, said that th insufficiency of evidence as to the employees' difficulties in complying with the new regime did not in itsel give rise to the inference that it was unreasonable to bring the case. There was no clear evidence to suppor the tribunal's finding that the employees knew or ought to have known that they had no realistic prospec of success. It could not be said that inherently and intrinsically the case was bound to fail. The tribuna had said that one employee got closer to establishing her case than another two, who in turn got closer than the fourth employee. Could it properly be said that the application of a sliding scale was a proper exercise of discretion? Was their conduct unreasonable or not? If it was unreasonable, the costs would flow. The sliding scale applied by the tribunal was somewhat muddled and there was no clear differentiation between the costs awarded for the unreasonable conduct in bringing the case and the costs awarded due to unreasonable conduct during the case. On the facts, the employees did not breach the threshold of unreasonableness set out in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919. It was not sufficient that an applicant failed to prove her case. If costs were awarded on the same basis as the tribunal had done in the present case, access to tribunals would be severely limited because of fear of costs. That would not be a proper interpretation of the statutory provisions. The present case had been properly brought, and costs had not been awarded on a proper basis. It was inappropriate to remit the case to the same tribunal and no other tribunal would be in a better position than the appeal tribunal to make a decision. In that rare circumstance the appeal tribunal would reverse the tribunal's decision that costs should be paid by the employees.

Sood v Immigration Advisory Service; 25 October 2002; EAT/153/01
EAT: Judge Pugsley, Mrs M McArthur and Mr H Singh

PAID ANNUAL LEAVE

An employment tribunal upheld a claim by a casual worker for a local authority that he was entitled to paid holiday pursuant to regulation 13(1) of the Working Time Regulations 1998, alternatively under article 7 of the Working Time Directive 93/104.

JUDGE BURKE QC, allowing an appeal by the council, said that for the purposes of the applicant's claim regulation 13 applied in its unamended form. The appeal tribunal was bound by the Court of Appeal's decision in *Gibson v East Riding of Yorkshire Council* [2000] ICR 890 to decide that article 7 of the Directive was not at the material time capable of being directly enforced by the applicant against the council. In *Voteforce Associates Ltd v Quinn* [2002] ICR 1, paras 12–15, the appeal tribunal had concluded that *R (BECTU) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152 did not have the effect of alleviating the difficulties placed in the path of those who sought to rely directly on article 7. As in that case, the appeal tribunal was thrown back on the proper construction of regulation 13, and it was inescapable that, in order to succeed, the applicant had to bring himself within regulation 13(7) and (8). The schedule setting out the hours worked by the applicant showed that there was no single period of 13 weeks in which he had worked in each week. If and in so far as the tribunal had reached its conclusion on the basis that there was a series of contracts between the applicant and the council, arising each time he was offered and accepted work, which in each of 13 successive weeks governed their relationship, that conclusion was demonstrably in error. Alternatively, the tribunal might have concluded that there was an overarching or umbrella contract which governed their relationship. The applicant signed two documents which set out that he would be offered work as and when required and paid weekly and which made clear that there was no contractual sick pay or holiday entitlement. As the appeal tribunal had concluded in *Volteforce*, the contract referred to in regulation 13(8) had to be a contract of service or a contract for services; the contract had to be one such as to render the individual a worker as defined by regulation 2(1). Though *Hellyer Brothers Ltd v McLeod* [1987] ICR 526 was not a case in which a contract of service or a contract for services was in issue, the decision underlined the essential need for mutuality of obligation to the existence of an umbrella contract of service; and in principle it was difficult to see why the need for or importance of such mutuality should be any less in the case of an umbrella contract for services. In the judgment of the appeal tribunal, mutuality of obligation to provide and perform work was as an essential an element of a contract for services as it was of a contract of ervice; in the absence of such mutuality, a claim based on an umbrella contract, whether of service or for ervices, had to founder. Where the worker was free to choose whether to accept work if offered and could ot call on any obligation on the employer to provide work, the claim to an umbrella contract had to fail. uch mutuality could not be found in the documents signed by the applicant. Accordingly, if the tribunal's ecision in favour of the applicant was on the basis of an umbrella contract, it erred in law, and, on the rimary facts, the tribunal should have concluded that the applicant's claim failed and it would be ismissed.

South Tyneside Metropolitan Borough Council v Toulson; 28 November 2002; EAT/1333/01
EAT: Judge Burke QC, Lord Davies of Coity and Dr D Grieves

ACE DISCRIMINATION

An employment tribunal, on a complaint of race discrimination, found that a remark, to the effect that eople of black Afro-Caribbean origin "come over here and scrounge off the system and then go back", ade by a fellow employee, constituted racial harassment of the applicant and made awards of ompensation against the fellow employee and the employers.

JUDGE REID QC, allowing an appeal by the fellow employee and the employers, said that the words omplained of should never have been used. They were not directed at the applicant but could be taken as eing aimed at her parents. The employers recognised that and disciplined the employee promptly for her emarks. The tribunal had deprived the appellants of the chance of cross-examining the applicant about he effect of the words on her. There was material on which substantial cross-examination could have been ounted as to the true effect of the words on the applicant. That would only have been immaterial if the ribunal had been correct in its view that if it was proved that the words were spoken there was necessarily etriment. If treatment was race specific there was no need to show that a person of a different colour ould have been treated differently. But section 4(2)(c) of the Race Relations Act 1976 did require a omplainant to show that he had been subjected to detriment. In *De Souza v Automobile Association* 986] ICR 514, 522, May LJ said: "Racially to insult a coloured employee is not enough of itself, even if hat insult caused him or her distress . . . the court must find that by reason of the act . . . a reasonable orker would or might take the view that he had thereby been disadvantaged in the circumstances in hich he had to work thereafter." That dictum had now to be treated with some reserve because it was lear that some levels of distress would be regarded as detriment, and in any event an environment where acist remarks were tolerated might itself be a detriment. While a single act of abuse was enough to found a omplaint, it did not necessarily amount to harassment. "Harassment" involved two elements: the argeting of the person being harassed and the causing of distress to the target. In very many cases the econd element would be extremely easy for the employee to establish, but that did not entitle the tribunal o assume the second element, nor, as the tribunal appeared to have done in the present case, to decide that he proof of the language created an irrebuttable presumption of detriment. There were some work nvironments in which (undesirable though it might be) racial abuse was given and taken in good part by embers of different ethnic groups. In such cases the mere making of a racist remark could not be regarded s a detriment. In the present case there was a single remark, clearly not directed to the applicant herself. It as made by a fellow junior employee. It was not the subject of complaint until considerably later. There as evidence of the two protagonists being on very good terms in the aftermath of the incident. The ribunal had erred in law in failing to consider whether there was a detriment and in preventing the ppellants from cross-examining to show that there was not. The matter would have to be remitted to a ifferent tribunal.

Thomas v Robinson; 21 October 2002; EAT/737/01
EAT: Judge Reid QC, Mr D A C Lambert and Mr J C Shrigley

ETIRING AGE

An employee who was approaching 60 years was asked by his employer whether he wished to retire at o, whether he wished to retire at 60, draw his lump sum and be re-employed in the same grade until he as 62 (the "maximum" retiring age for his grade) or whether he wished to continue to 62 before retiring. e chose the second option, but three days before his 60th birthday he was notified that his employer had ecided not to re-employ him. On his complaint of unfair dismissal, an employment tribunal found, as a reliminary issue, that the normal retiring age for employees holding the applicant's position was 62 and e was not therefore precluded by section 109 of the Employment Rights Act 1996 from pursuing his omplaint.

WALL J, allowing an appeal by the employers, said that the employment tribunal had plainly failed to llow the guidance contained in the speech of Lord Fraser of Tullybelton in *Waite v Government ommunications Headquarters* [1983] ICR 653, 662–663. Lord Fraser rejected the view that the ontractual age conclusively fixed the normal retirement age, but, however one looked at it, that was the nding made by the tribunal. The tribunal's use of the phrase "the contractual retiring age and therefore e normal retiring age" could only be construed as a clear misdirection in law. Had the tribunal found

60 to be the contractual retiring age, that would not necessarily have been the end of the matter. Th tribunal would then have needed to examine any evidence available to rebut the presumption that th contractual retiring age was the normal retiring age for employees of the applicant's grade. In that context statistics as to the number of employees who stayed beyond 60 would be relevant. The quality of the statistics, and how informative they were, were, of course, matters of evidence for the tribunal. It did not however, attempt to evaluate the statistics: it merely deemed them irrelevant. Nothing in *Hughes v Department of Health and Social Security* [1985] ICR 419 derogated from Lord Fraser's speech in *Waite* and the proper approach he laid down to what was now section 109 of the Employment Rights Act 1996 The question for the tribunal was whether or not the applicant had a reasonable expectation of having a normal retirement age of 62 based on the documentation and any other admissible evidence. The fact that there had been a practice of permitting employees to remain in employment up to 62 might well be evidence in support of that reasonable expectation but it was in no sense determinative of it. However, the tribunal could only properly approach the question by deciding first what his contractual retiring age was. If it was 60, the question of reasonable expectation of a normal retiring age of 62 would then arise. If 62, the question of reasonable expectation was irrelevant. It was not permissible, as the tribunal appeared to have done, to use the concept of "reasonable expectation" as a means of ascertaining the contractual retiring age. The matter would be remitted for rehearing. As neither party submitted that there was no contractual retiring age, the issue would be whether it was the same as the normal retiring age.

Customs and Excise Comrs v Jayawardane; 2 December 2002; EAT/1092/01
EAT: Wall J, Mr A E R Manners and Mr S M Springer

UNFAIR DISMISSAL

In October 2001 employers decided to make redundant one of two field service engineers that it employed and gave the applicant notice expiring on 30 November, on which date the other engineer informed the employers that he was resigning. On the applicant's complaint of unfair dismissal, the employment tribunal found that there had been improper consultation over the selection of the applicant for redundancy and determined, pursuant to *Polkey v A E Dayton Services Ltd* [1988] ICR 142, that, had a fair procedure operated, the applicant's employment would have continued until 31 December 2001; and it awarded compensation on that basis.

JUDGE McMULLEN QC, allowing an appeal by the applicant, said that the employment tribunal's approach had been attacked on the basis of *Stacey v Babcock Power Ltd* [1986] ICR 221. It was clear that all information available to an employer at the date of termination of the employment relationship was relevant in considering the fairness of a dismissal: see *Williamson v Alcan (UK) Ltd* [1978] ICR 104, 109B–C. The employment tribunal had not been referred to the cases now relied on. Though the employers accepted that *Stacey* was relevant, they submitted that it should be distinguished. The appeal tribunal disagreed. *Stacey* was authority for the proposition that a fair dismissal might become unfair as a result of supervening events. It became unfair to carry out an otherwise genuine redundancy dismissal when either more work became available, as in *Stacey*, or the pool of people to be dismissed reduced, as in the present case. Had the tribunal applied *Stacey*, the situation as to the *Polkey* reduction would have been different. The chronology of the case indicated that the applicant would not have been dismissed had a proper procedure been carried out, since if he had been engaged for a further month until the end of December 2001, when the other engineer left, there would have been no need for the employers to have engaged someone else. The correct finding, that no dismissal would have occurred, would be substituted for the limitation of the period of compensation to one month, and the matter remitted to decide the compensation due on that basis.

Colvin v Attol Business Systems Ltd; 29 November 2002; EAT/880/02
EAT: Judge McMullen QC, Mr R N Straker and Mr G H Wright

MPENSATION

An employee who was made an offer of promotion which was then withdrawn by her employers nplained that she had been discriminated against on the ground of trade union activities. The complaint s upheld by the employment tribunal which awarded the employee compensation of £5,000 for injury to lings.

ELIAS J, dismissing an appeal by the employers against the amount of the award, said that it was ;ued that the tribunal ought to have made explicit comparison with the appropriate range of awards in rsonal injury cases; that it had erred in treating the range of awards for damages for injured feelings in present case as being in the same range as those in cases of race and sex discrimination; and that the ard was excessive. There was no need for a tribunal expressly to seek to locate where it would place the ts of the case before it in the framework of awards for injuries in personal injury cases. The Court of peal in *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 approved observations of Smith J in *son Service v Johnson* [1997] ICR 275, 283: "Awards should bear some broad general similarity to the ıge of awards in personal injury cases. We do not think that this should be done by reference to any rticular type of personal injury award, rather to the whole range of such awards." There were no ounds for asserting that discrimination on trade union grounds would justify lower awards of npensation than for other forms of discrimination such as race or sex. In each case it was necessary to ablish the loss by focusing on the particular injury suffered. If the injury in two cases was the same, it uld not be just to award different levels of compensation simply because the source of the injury was ferent forms of discrimination. But it ought not readily to be assumed that injury to feelings inevitably wed from each and every unlawful act of discrimination. Some persons discriminated against on trade ion grounds might feel deeply hurt by that affront, particularly where union membership was an portant feature of their lives; other more robust characters might consider it of little consequence and fer little, if any, distress. Since the aim was to compensate and not to punish, the compensation to be arded ought not to be the same in each case. In *Vento* the Court of Appeal gave guidance as to the propriate level of awards. In the light of that guidance, the appeal tribunal had to decide whether the n awarded was larger than appropriate for the nature of the injury sustained. Although it was on the h side, it was not so clearly erroneous as to justify intervention.

Hackney London Borough Council v Adams; 6 February 2003; EAT/1318/01
EAT: Elias J, Miss C Holroyd and Mr G H Wright

SABILITY DISCRIMINATION

An employment tribunal dismissed a complaint by an employee that she had been dismissed for a son relating to her disability contrary to section 4 of the Disability Discrimination Act 1995.

ELIAS J, dismissing an appeal by the employee, said that whether someone was dismissed for a reason ating to her disability was simply a question of fact. The tribunal had found that the reason for the ployee's dismissal was performance and that the alleged shortcomings were in no way related to her ability. On the face of it that was a finding of fact which determined the outcome of the claim, as the bunal held. It was submitted on behalf of the employee, however, that the tribunal had failed to make tain findings of fact which it was obliged to make before reaching its decision. It was submitted that nciples enunciated in *Anya v University of Oxford* [2001] ICR 847, 859–860, paras 23, 25, in the ntext of race discrimination, ought to apply equally to cases of disability discrimination; that there was same risk that an employer might seek to conceal the real basis for his actions, or, alternatively, might unconsciously influenced by considerations in relation to the disability of the employee. While epting that the same risks might, in certain contexts, arise and that the approach in disability cases ght to be as indicated in *Anya*, albeit that in practice there might be less risk of unconscious or ntended prejudice motivating decisions in that area, the question was: what were the material facts in pect of which findings needed to be made? *Anya's* case did not say that a tribunal had to resolve every tter of disputed fact. The present case was materially different to *Anya*. It was not a case where the nager taking the decision to dismiss could have been unconsciously influenced by the employee's ences. A person could not be influenced by a factor, whether consciously or unconsciously, if he was ware of it. Notwithstanding that the tribunal found weaknesses in the employers' evidence, it reached clear conclusion that the manager was telling the truth. In those circumstances, since he did not know he factors relied on as the basis of the disability claim, he could not have been dismissing for reasons ating to disability. That was not necessarily the end of the matter in all cases, because someone who was ware of factors which might demonstrate an improper discriminatory influence might nevertheless be uenced by discriminatory considerations. After careful consideration, it seemed to the appeal tribunal t the tribunal's decision, fairly read, indicated that the manager had come to his own independent decision. There was no evidence to suggest that he had acted on the basis of any tainted eviden moreover, the case did not appear to have been run on that basis.

Williams v YKK (UK) Ltd; 22 November 2002; EAT/408/01
EAT: Elias J, Ms J Drake and Mr P Gammon

REDUNDANCY

An employee, one of two executive assistants employed by her employers, was selected for redundan when the employers decided they no longer had any need for two executive assistants, at a time when th employee was absent from work suffering from severe depression and unable to contemplate returning work. On complaints by the employee, the employment tribunal held that (1) the employee had bee dismissed by reason of redundancy; (2) the dismissal was unfair; and (3) the employers had discriminate against the employee, contrary to section 4(2)(d) of the Disability Discrimination Act 1995, by dismissin her.

WALL J, dismissing an appeal by the employers, said that the employment tribunal found that th employee had been given no prior warning of impending redundancy and had been consulted only i respect of redeployment. The tribunal did not consider that proper consultation would genuinely hav been fruitless and held that there was procedural unfairness in the redundancy process. Finally, th tribunal found that it was because she was absent, owing to her disability, that the employers had failed t discuss the redundancy situation with her and that no justification had been put forward for that les favourable treatment. The employers argued that, in the context of the tribunal's findings that there was genuine redundancy situation and that the employee had been dismissed as redundant following th application of genuine selection criteria, it was inconsistent of the tribunal to find that the dismissa constituted an act of disability discrimination. On unfair dismissal, the employers submitted that it was th employee's own act, in saying, in a letter to the employers, that there were no circumstances under whic she would have returned to work for the employers, that brought about the alleged "procedura unfairness". In the judgment of the appeal tribunal, there was material on which the tribunal coul properly reach each of its three conclusions, and there was nothing inconsistent between the findings tha the employee was dismissed by reason of redundancy and that the dismissal was both unfair and discriminatory consequent on her disability. The evidence plainly entitled the tribunal to find that the redundancy process was procedurally and substantively unfair, given the failure to consult and the presentation of what was, in effect, a fait accompli. It would not be just to permit the employers to rely on the employee's letter since it followed the fact of the employers informing her, without warning or consultation or even informing her of the selection criteria, that she was to be made redundant.

Bax Global Ltd v French; 29 November 2002; EAT/812/01
EAT: Wall J, Mr D Chadwick and Mr K Edmondson

STRIKING OUT

An order dismissing an applicant's complaint of race discrimination, following the rejection of his renewed application to adjourn the hearing, which had been listed for 10 days, was subsequently revoked by the employment tribunal. The complaint was later combined with a second complaint, and, when the applicant's renewed application to postpone the listed hearing of those complaints was rejected, he refused to proceed. The employment tribunal struck out the complaints, under rule 13(2)(e)(f) of the Employment Tribunals Rules of Procedure 1993, on the grounds of want of prosecution and that the applicant had conducted the proceedings in a manner both scandalous and frivolous.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that the appeal tribunal accepted the respondents' submission that the expression "want of prosecution" embraced conduct by a party which gave rise to the inference that he did not intend to bring the proceedings to a conclusion. It included the case of a party whose deliberate default in compliance with a peremptory order of the court or tribunal or whose conduct was an abuse of process was coupled with a substantial risk that it was not possible to have a fair trial. Surveying the course of the present litigation, the appeal tribunal had no doubt that the applicant's conduct was an abuse of process. It was designed to cause maximum vexation, inconvenience and expense to the respondents and their witnesses. The final straw had been the applicant's refusal to prosecute his case. Want of prosecution did not simply arise at the interlocutory stage of proceedings. It could also arise, and on the facts of the present case did arise, when the full hearing was reached and the applicant refused to prosecute his case. The employment tribunal had been perfectly entitled to strike out the complaints on that ground. Strictly, that disposed of the appeal, however, the appeal tribunal further found that the relevant decision could properly be upheld on the ground that the applicant's conduct was both frivolous and scandalous for the reasons given by the employment tribunal. The respondents applied for costs. Bearing in mind that the appeal had been permitted to proceed to a full hearing, one could not say that the applicant's initial stance in pursuing the appeal was unnecessary or otherwise fell within the terms of rule 34 of the Employment Appeal Tribunal Rules. However, it seemed clear that the applicant had not adopted or advanced any of the grounds on which the appeal had been permitted to proceed. In ose circumstances, the appeal hearing was wholly unnecessary and the respondents were entitled to their sts.

Zalzala v Sheffield University; 29 November 2002; EAT/201/01
EAT: Judge Peter Clark, Lord Davies of Coity and Mrs D M Palmer

EINSTATEMENT

An employment tribunal made an order for the reinstatement of an applicant employee under ction 114 of the Employment Rights Act 1996 following a finding of unfair dismissal. The employers led to comply with the order and, on their appeal, the appeal tribunal remitted the case for consideration on the ground that the issue of contributory conduct had been raised at the hearing but not nsidered by the tribunal. At the remitted hearing the tribunal found that the applicant had not ntributed to his dismissal; it excluded evidence of matters occurring after the date of the employers' cision not to comply with the reinstatement order, in relation to whether it was practicable to reinstate e employee, and awarded compensation which included an additional award.

JUDGE PETER CLARK, allowing an appeal by the employers, said that in its decision on the remitted aring the tribunal stated that at the remedies hearing it had determined the issue of contribution orally t it simply had not been recorded in the written decision. A finding on contribution was an essential part the tribunal's reasoning. That proposition was derived from the mandatory requirement in rule 12(3) of e Employment Tribunals Rules of Procedure 2001 that the tribunal "shall give reasons for its decision in document signed by the chairman" and *Portsea Island Mutual Co-operative Society Ltd v Rees* [1980] R 260, 264. At the remitted hearing the tribunal had expressed its conclusions on contribution but had led to provide any adequate reasons for that conclusion. The matter would have to be remitted for a rther decision so that the employers might know why they lost on that issue. The questions for the bunal were: was the applicant guilty of blameworthy conduct in any or all of the respects alleged? If so, d that conduct cause or contribute to the dismissal (as opposed to its fairness)? In the event of a finding of ntribution, it was for the employment tribunal to assess the degree of contribution. It was submitted that e tribunal had wrongly excluded relevant and admissible evidence that went to the issue of practicability. was clearly established (see *Port of London Authority v Payne* [1994] ICR 555, 569–570) that the medy of reinstatement involved a two-stage process, the first stage, at the initial remedies hearing, was to ok forward. The employment tribunal was required to form a provisional view as to whether nstatement was practicable. If so, an order was made, specifying the date reinstatement was to take ace. If the employer failed to reinstate, the matter returned to the tribunal for a further remedies hearing. that stage it was open to the employer to seek to show, the burden resting firmly on him, that it was not acticable to reinstate the applicant. At that second stage the tribunal was looking back, finally termining the question of practicability on the facts which had actually occurred. The relevant date for termining the practicability or otherwise of reinstatement at the second stage was the date on which nstatement was ordered to take place. It followed that the relevant date was not, as the tribunal found, e date on which the employers decided not to comply with the order. The statutory question was not ny the employer did not fully comply with the reinstatement order (his reason) but whether it was not acticable to do so. That question had to be answered on the actual facts as they existed on the date dered for compliance. The case would be remitted with a direction to admit the relevant excluded idence.

Yorkshire Rider (t/a First Huddersfield) v Neckles; 20 December 2002; EAT 89/02
EAT: Judge Peter Clark, Mr M Clancy and Mr D Smith

SMALL BUSINESS EXEMPTION

An employment tribunal rejected an applicant's complaint of disability discrimination on the groun that the respondent employment agency was an employer with fewer than 15 employees for the purpos of the small business exemption in section 7 of the Disability Discrimination Act 1995 (as amended by th Disability Discrimination (Exemption for Small Employers) Order 1998).

JUDGE McMULLEN QC, allowing an appeal by the applicant, said that the respondent agenc employed six persons, but had on its books a large number of people who were engaged under what wer called "temporary worker" contracts. In any given week it would send to its clients between 130 and 20 temporary workers. The business suffered as a result of the loss of a major client and the applicant wa chosen for dismissal. The exemption in section 7 of the 1995 Act had to be strictly construed. Th applicant was entitled to a hearing of her complaint unless it was clear that her right was excluded. Th employment tribunal decided that the headcount of temporary workers on the agency's books should nc be included for the purposes of section 7. The tribunal had expressly based its decision on the definitions in section 230 of the Employment Rights Act 1996, but had failed to address itself to section 68 of the 199 Act and had erred in failing to deal with the applicant's submission that the definition of "employment was regulated for the purposes of the Disability Discrimination Act 1995 by that Act and not by th Employment Rights Act 1996. Though that would be sufficient to remit the case, the appeal tribuna would deal with the substance of the argument. The temporary worker contract contained expres references to the Working Time Regulations 1998, claims for any breach of which it was accepted would be made against the agency. Accordingly, the temporary worker must be within the definition in regulation 2 of those Regulations and, on that analysis, performed personally any work or services for another party to the contract, i e the agency. The persons affected by the temporary worker contract were workers; they did work; they could not substitute another person to take their place. Though the work was done for a client of the agency, in practical terms, the contractual relationship was exclusively between the temporary worker and the agency, and the fact that the work was performed for the client did not take it outside the scope of section 68. All that was required was for there to be an obligation to do work. That was the simple answer to the legal point in issue. The employment tribunal had considered the definition of contract workers as opposed to employees within section 12, but that was not relevant to the correct meaning of section 68. The tribunal also considered the agency's degree of control over its temporary workers. Again, that matter did not arise. The correct answer was to look simply at section 68 and to make an assessment of whether or not the temporary worker contract fitted within that definition. Though the language of the contract excluded the relationship of a contract of employment as between the agency and the worker, viewed as a whole, the obligations set out in the contract corresponded to those envisaged in section 68.

Burton v Frances Higham (t/a Ace Appointments); 14 February 2003; EAT/609/02
EAT: Judge McMullen QC, Mr P R A Jacques and Mrs M McArthur

TIME LIMIT

An employment tribunal chairman ruled, at a hearing for directions of a complaint of race discrimination received by respondents on 31 May 2002, that a notice of appearance presented by the respondents on 21 June 2002 was in time under rule 3(1) of the Employment Tribunals Rules of Procedure 2001.

JUDGE McMULLEN QC, dismissing an interlocutory appeal by the applicant, said that the matter could not be clearer than in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, which was the modern approach to drafting rules, so that one saw properly worked out examples by reference to the calendar. Calculation began, under regulation 2(7), the day after the relevant event. In the present case that was 1 June 2002, and, thus, 21 June 2002 was within 21 days of the service of the originating application on the respondents. Regulation 2 entirely governed the factual circumstances of the present case and there was no error in the construction adopted by the tribunal chairman. The respondents applied for costs under rule 34 of the Employment Appeal Tribunal Rules. The applicant, who was appearing in person, had a law degree and had been called to the Bar in 1998; his skeleton argument made it clear that he had thoroughly researched his arguments. It was unreasonable conduct, going beyond simply making an error of law, for a person with such a background not to have read the sole rule referred to by the chairman in giving his decision, even after sight of the respondents' skeleton argument. The point was obvious and the respondents had not been called on. The applicant submitted that his means should be considered, but the court was required to disregard them by the Court of Appeal decision in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, at least until the Employment Act 2002 was brought into effect. The Treasury Solicitor had claimed six hours' preparation and attendance at £142·50 per hour. For a solicitor in Central London, even in the public service, there seemed nothing offensive about that rate,

›ugh confirmation that that was the right figure had to be submitted; but the amount of time given to the e by the solicitor did seem excessive, as she instructed counsel. Two hours would be awarded. The ggestion that it was not proportionate to have counsel at the hearing, given that the solicitor had peared in the employment tribunal, was rejected. It was entirely appropriate for the Lord Chancellor's partment and for a judge sued personally to wish to be represented by experienced counsel. The five urs, at the Treasury Panel rate of £100 per hour, claimed for counsel's preparation and attendance ıuld be allowed.

Moore v Lord Chancellor's Department; 14 February 2003; EAT/64/03
EAT: Judge McMullen QC

ITNESS ORDER

An employment tribunal chairman refused applications by an applicant employee for witness orders on grounds that the applicant had failed to state what evidence the witness was expected to give and that it peared that he might be seeking to call the witnesses solely in order to cross-examine them. The plicant's complaint was subsequently dismissed and he appealed against both decisions. The appeal ›unal extended time for appealing against the refusal of the witness orders and permitted the appeal to ›ceed to a full hearing without extended reasons.

JUDGE PETER CLARK, dismissing the appeals, said that the appeal tribunal had first to satisfy itself ıt it had jurisdiction to hear the appeal against the refusal of the witness orders [an issue raised by the peal tribunal at an interlocutory stage], though jurisdiction was not disputed by the respondent ployer. The grant or refusal of a witness order was not an administrative act but a judicial decision operly characterised as an interlocutory order. Regulation 2(2) of the Employment Tribunals onstitution and Procedure) Regulations 2001 defined "decision". It did not include interlocutory orders ıde or refused under rule 4(5) of the Employment Tribunals Rules of Procedure in Schedule 1 to the 2001 gulations. The use of the expression "decision of, or arising in any proceedings" in section 21(1) of the nployment Tribunals Act 1996 had to include not only a decision as defined in regulation 2(2) of the ›1 Regulations but also interlocutory orders, not being decisions, themselves arising in proceedings ore an employment tribunal. If there were any doubt, it was removed by rule 3 of the Employment peal Tribunal Rules 1993 which referred to "the decision or order of an employment tribunal". Thus, Employment Appeal Tribunal had jurisdiction to hear appeals against interlocutory orders, not being ecisions" of the employment tribunal. The time for appealing under rule 3(3)(a) was 42 days from the te on which extended reasons for the decision or order were sent to the appellant. The difficulty was ıt, whereas a tribunal could be required to provide extended reasons for its decision, the same was not so respect of orders not being decisions. In practice that mismatch was avoided by recourse to rule 39(2) of 1993 Rules, waiving the requirement for extended reasons. That lacuna had recently been filled by ragraph 3(1) of *Practice Direction (Employment Appeal Tribunal: Procedure)* [2003] ICR 122, 124. e appeal tribunal rejected the employer's submission that, by failing at the substantive hearing to renew earlier application for a witness order, the applicant could not now rely on any error in relation to the usal of the witness orders to set aside the substantive decision. By not renewing his application, the plicant was not conceding the point. It had been judicially determined against him, and it would only be propriate to renew his application if there had been a material change of circumstance. A witness order ›uld be made to compel the attendance of a witness where the tribunal was satisfied (a) that the witness ıld give prima facie relevant evidence, and (b) that it was necessary to issue a witness order. Plainly the ctice of paper applications for witness orders in advance of a substantive hearing was a sensible course. wever, it was incumbent on the party applying for the witness order to indicate precisely what evidence sought to adduce from the proposed witness so as to pass the test of prima facie relevance. The tribunal, chairman, had a discretion which had to be exercised judicially. Relevant factors to be weighed in the ance might include the degree of relevance of the witness's evidence and consideration of whether, in ler to extract relevant evidence, the party calling the witness would need, impermissibly, to cross-amine his own witness. The question was whether the chairman, on the material then available, failed to e into account relevant factors, or took into account irrelevant factors, or otherwise reached a nclusion which was legally perverse. The state of knowledge at the relevant stage was that both nesses had failed to respond. In those circumstances the applicant was not putting forward what the nesses had told him they would say in evidence, rather what he hoped and felt they would say. In those cumstances it had been open to the chairman to infer that in order to elicit their evidence it would be essary for the applicant to put leading questions to the witnesses; in other words, to cross-examine m. The reason put forward by the chairman was both permissible and relevant. More generally, it was rect that the full reasons for the order were not set out, but, since the appeal was heard in the absence of ended reasons, the ordinary principle—that the tribunal should tell parties why they had won or lost— ıld not apply with full rigour.

Haydock v G D Cocker & Sons Ltd; 18 December 2002; EAT/215/02
EAT: Judge Peter Clark, Mr D J Jenkins and Mr G Lewis

UNFAIR DISMISSAL

An applicant employee spent half her time as secretary to the managing director and half as personne officer, with two employees reporting to her on personnel matters. When one of those employees wa offered a post as full-time personnel officer, after the applicant had proposed that she herself should take o a full-time personnel role, she raised a grievance, and, when she was offered a grievance meeting with member of the board of directors subject to producing a medical report showing that she was fit to pursue grievance, she resigned. An employment tribunal upheld the applicant's complaint of unfair dismissa holding that there had been an initial breach of contract by the employer in fundamentally changing he job structure and status, which was compounded by the subsequent handling of her grievance, destroyin the relationship of trust and confidence.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the employer submitted that the employment tribunal found no term of the contract that the two employees reported to the applicant thus, removal of those reports could not amount to a breach of the contract, let alone a fundamental breach. The appeal tribunal accepted that submission in so far as it went. However, there was a furthe difficulty. It was the applicant's case in part that the employer was in fundamental breach by effecting a substantial change in her status and job content. The employment tribunal made no finding of fact on tha contention, saying "whatever the changes to the job content might or might not be". It followed that the decision was flawed in purporting to find a breach of a non existent term and in failing to make a clear finding as to whether the relevant contractual term, the personnel function, was breached and breached fundamentally. Further, the employment tribunal, in formulating the implied term of mutual trust and confidence, omitted reference to the qualification "without reasonable and proper cause". The employer submitted that the tribunal fell into error in concluding that it was in breach of the implied term in failing to deal properly with the applicant's grievance at the same time finding that she had not sought to pursue her grievance in accordance with the terms of her contract of employment. The employer submitted correctly, that an employer could not be held to have breached the implied term, without reasonable and proper cause, in circumstances where the employer was seeking to apply the contractual grievance procedure and the employee was not. The employment tribunal's use of the word "compounded" was not altogether easy to follow, and the appeal tribunal were unsure as to precisely what facts the employment tribunal found amounted to a fundamental breach of the implied term. As to the fairness of any dismissal, the employer submitted that the passage from the judgment of the court given by Browne-Wilkinson LJ in *Berriman v Delabole Slate Ltd* [1985] ICR 546, 550G–551A, meant that it was for the employer to justify the conduct which the employee complained amounted to a repudiatory breach. That was not the understanding of the appeal tribunal. Section 98(1) of the Employment Rights Act 1996, the successor to section 57(1) of the Employment Protection (Consolidation) Act 1978, required the employer to show a potentially fair reason for dismissal and dismissal included constructive dismissal under section 95(1)(c). Thus it was for the employer to show a potentially fair reason for the constructive dismissal in accordance with section 98(2) or some other substantial reason (section 98(1)(b)). The employer was not required to justify the repudiatory conduct, but to show the reason for it. That led on to the difficulty in the tribunal's finding that the constructive dismissal, as found, was unfair. Nowhere from the tribunal's reasons could the appeal tribunal discern (a) the potentially fair reason for dismissal advanced by the employer and (b) the tribunal's finding as to whether that reason was established. The tribunal found that it could not be said that the employer acted reasonably within section 98(4), but that was not the statutory question. The tribunal had first to find a potentially fair reason for the dismissal. If none was advanced, the dismissal was unfair. Section 98(4) was not engaged. If a potentially fair reason was established, it was then the reasonableness of the employer's decision to dismiss for that reason which fell to be considered under section 98(4), not the conduct of the employer which led the employee to resign in a constructive dismissal case. The tribunal decision was fundamentally flawed, and the only proper course was to remit the matter to a fresh tribunal for the entire case to be reheard.

Cape Industrial Services Ltd v Ambler; 20 December 2002; EAT/950/01
EAT: Judge Peter Clark, Mr D J Hodgkins and Mr N D Willis

[2003] ICR Part 7

ISABILITY DISCRIMINATION

An employee, an apprentice bricklayer, complained, inter alia, that he had been subjected to a ontinuing act of disability discrimination arising from bullying by other persons working with him. The nployment tribunal dismissed the complaint on the ground that the employer was not liable for disability scrimination by a contractor's operatives under section 58 of the Disability Discrimination Act 1995.

JUDGE PROPHET, allowing an appeal by the employee, said that the employment tribunal were vare of the basic nature of the contract between the contractor and the employer, ie to provide icklaying services; and it was open to them to reach the conclusion that it could not properly be described one which involved a contract personally to do work. It was submitted on behalf of the employee that e employment tribunal should have considered the possible application of the principles in *Burton v De ere Hotels Ltd* [1997] ICR 1, which undoubtedly applied to race and sex discrimination, to the nployee's disability discrimination complaint. The employer argued that the wording of section 5(1) of e 1995 Act did not permit the application of the *Burton* principles to that Act; that discrimination could ly be found on the part of an employer under section 5(1) if "for a reason which relates to the disabled erson's disability, *he* treats him less favourably . . ." The difficulty with the employer's submission was at it did not allow the disability discrimination legislation to provide any protection for someone in the esent employee's position, assuming that there was harassment from the operatives that could qualify as sability discrimination. It would be an odd result if the principles in Burton could not be applied to sability discrimination simply because of the way in which the terms of the 1995 Act had been set down. ne appeal tribunal favoured a purposive construction of the legislation so that so far as possible scrimination legislation moved in harmony. There was no reason why the duty place on an *employer* by ction 4(2)(d) of the 1995 Act (which had the same wording as the Race Relations Act 1976 and the Sex iscrimination Act 1975 which was the basis of the *Burton* ruling) should be thwarted by the definition of scrimination in section 5(1) where the words "a reason which relates to the disabled person's disability" ere usually regarded as having a wide sweep. The employee had a strong case for arguing that the ontrol" principles enunciated in *Burton* should apply to the employer who had contract labour. The case ould be remitted for further consideration, but the employer would have leave to appeal.

Ree v Redrow Homes (Yorkshire) Ltd; 9 April 2003; EAT/35/03
EAT: Judge Prophet, Ms S R Corby and Mr G Lewis

EMEDY

An employee was dismissed for gross misconduct when his employer formed the view that he was sponsible for pools of liquid, believed to be urine, on the locker room floor. An employment tribunal und that the dismissal had been unfair, in that there were doubts about the reasonableness of the nployer's grounds for concluding that the employee was guilty of misconduct, the investigation was not asonable and the decision to dismiss summarily was not a reasonable sanction; but held that, applying e rule in *Devis v Atkins* [1977] ICR 662, it was not just and equitable to award him any remedy as the nployer would have had adequate grounds for dismissing the employee fairly because he had deliberately isled the employer as to the nature of his medication, holding himself out as diabetic in order to work wer hours.

ELIAS J, allowing an appeal by the employee, said that the principal ground of appeal was that the bunal had failed to comply with the principles of natural justice in that they did not give the employee y opportunity to deal specifically with the *Devis v Atkins* point. The employer submitted that the nployee had had the opportunity to make representations and that, in any event, the present was one of ose exceptional cases where there was nothing that the employee could say; that it would be fruitless to mit the matter when the case against the employee was overwhelming. The appeal tribunal could see the rce of those submissions, and no doubt there were exceptional cases, but the present was not such a case. was said on behalf of the employee that there might be additional evidence he could advance and that, oreover, it was far from clear that even if there had been deliberate deceit it would have justified smissal. The appeal tribunal was satisfied that it would be wrong, in the circumstances, to deprive the nployee of an opportunity to call such evidence as he thought might be relevant to the issue and to make bmissions in relation to the point. The employment tribunal considered that the employee had had the portunity to deal with the matter but had not taken advantage of it. The appeal tribunal did not think at that opportunity had been sufficiently unambiguously made available to him to justify being satisfied at he had been fairly treated. Accordingly, there had been an infringement of the principles of natural stice and the matter would be remitted for the question of remedy to be considered. It was submitted on half of the employee that, in any event, even if the tribunal could properly conclude that it was not just d equitable to grant compensation, they could not strictly and in accordance with section 116 of the nployment Rights Act 1996 have refused to grant the remedies of reinstatement or re-engagement for the reasons they gave. It was not necessary, finally, to decide that matter, but it did seem that the employmen tribunal probably did have a broad discretion to do what was just and was not limited by section 116 onl to take into account the matters there referred to. It would be very strange if a tribunal were entitled t award no compensation under the *Devis v Atkins* principle but could not, on the same basis, refuse to mak an order of reinstatement or re-engagement. Counsel for the employee recognised that it might properly b said that it would not be practicable for an employer to comply with such an order where it had lost trus and confidence in the employee but submitted that that was not the way in which the employment tribuna had framed their decision. Even if that analysis was strictly correct, the appeal tribunal would not hav remitted the matter simply on the basis that the tribunal expressed their reason for refusing reinstatemen or re-engagement on the broad ground that it was not just and equitable to do so, without saying in term that it was not practicable to do so.

Iqbal v Consignia plc; 5 December 2002; EAT/1364/01
EAT: Elias J, Mr M Clancy and Mr T Haywood

UNFAIR DISMISSAL

An employee was dismissed, after 24 years with his employer, on the ground that he had taken a day's holiday when he was aware that he had not been entitled to do so. An employment tribunal rejected his complaint of unfair dismissal on the ground that the dismissal was not unfair.

KEITH J, on an appeal by the employee, said that a conventional approach to the evidence, in line with *British Home Stores Ltd v Burchell (Note)* [1980] ICR 303, would have been for the employment tribunal to consider whether the employer could reasonably have concluded that the employee had been aware that he had not been entitled to take the day's holiday. Instead, the tribunal decided *for itself* whether the employee had been aware of that and therefore whether he could not have been telling the truth in the course of a disciplinary hearing when he said otherwise. That was not a legitimate approach. The *Burchell* test was not simply *a* permissible approach to allegations of misconduct; it was the *only* permissible approach. In deciding for itself whether the employee had been guilty of misconduct, the employment tribunal apparently fell into error. The position could have been otherwise if what the tribunal had been doing was to reach its own conclusion on the basis of material before the employer in order to assess whether the employer's conclusion that the employee was guilty of misconduct was reasonable. But it was said by the employer that, whatever the issues for the employer at the disciplinary hearing, before the employment tribunal the only point taken on behalf of the employee was that in view of his very long service with the employer the ultimate disciplinary sanction of dismissal was too harsh, and it had *not* been contended that it had not been open to the employer reasonably to conclude that the employee had not been entitled to a day's holiday. If that was correct, any error made by the tribunal could not be said to have infected the tribunal's view as to whether dismissal was within the range of responses open to a reasonable employer. The tribunal had not substituted its own view for that of the employer on the question of the appropriate sanction. Thus, the outcome of the appeal depended on whether it had been contended on behalf of the employee in the employment tribunal that it had not been reasonably open to the employer to conclude that he had been aware that he was not entitled to take the day's holiday. The appeal tribunal had decided to take the course of adjourning further hearing of the appeal so that inquiries could be made of the employment tribunal as to whether that contention had been made on behalf of the employee. The tribunal's recollection would not be decisive, but would be regarded as just one of the factors to be taken into account. That course would not have been necessary if the employment tribunal had clearly identified the issues which it had had to decide.

Rajpra v Timet UK Ltd; 21 March 2003; EAT/827/02
EAT: Keith J, Mr D Norman and Mrs R A Vickers

VICTIMISATION

An employment tribunal upheld an employee's complaints of, inter alia, race discrimination and victimisation made against his employer and two individual officers of the employer.

JUDGE McMULLEN QC, dismissing an appeal by the respondents, said that the employment tribunal's findings of direct race discrimination and victimisation were strong because they were cogently organised and argued, so that one could see clearly the thinking behind each finding and the process of reasoning from which the tribunal moved from primary fact to inference to conclusion. The tribunal had directed itself according to the relevant provisions of the Race Relations Act 1976 and the relevant authorities. At the forefront of the respondents' complaints about the tribunal's decision was its decision on victimisation. The employee had contended that two protected acts within the meaning of section 2 of the 1976 Act had been taken: the issuing of a grievance and the service of a statutory race relations questionnaire. In *Waters v Comr of Police of the Metropolis* [1997] ICR 1073, 1097 Waite LJ considered a submission based on section 4(1)(d) (the relevant subsection for the purposes of the present appeal) and rejected a submission that a broad approach was to be taken to protected acts. It seemed to the appeal tribunal that for a complaint of a protected act to fall within the definition there had to be some way in

h the discriminator could know that an assertion had been made which was linked to discrimination
im, contrary to section 6(2). The employee's grievance letter raised serious dissatisfaction with the
idual officers; it did not in any sense reflect a complaint which related to race. It was a complaint of
ir treatment of him as an employee, making no specific or even general complaint based on race. It
d not be said that the officers could or should have divined that the complaint was of race
imination. Just because an employer had treated unfairly one of its employees who was black did not
n that it had done so because he was black, otherwise the rule in *Glasgow City Council v Zafar* [1998]
120 would be given no purpose. An employer was equally capable of treating unfairly persons from a
e of ethnic groups; it was contrary to the anti-discrimination statute when such action was on racial
nds or, in a case of victimisation, was because of the discriminator's knowledge that the person
erned had committed a protected act. The first protected act relied on—the grievance—did not fall
in section 2(1)(d); but it was accepted that the questionnaire was a protected act. As a matter of
ty, the questionnaire was followed by steps directly targeted at the employee which involved his
tion for redundancy. The causal connection between the two was made by the employment tribunal;
was a matter of fact for that tribunal. The appeal tribunal saw no reason to interfere with it, based as
as on the extremely powerful infrastructure of findings and reasons. As to the substantive
rimination, the overall impression which the tribunal was enjoined to make—see *Anya v University of*
ord [2001] ICR 847—was one which emerged clearly from its reasoning. It found a string of incidents
a short period which were in themselves discriminatory and which, as a whole, also created a full
scape of discrimination. It could not be said that the tribunal's findings were findings which no
onable tribunal could have made.

The Prince's Trust v Beckford; 6 February 2003; EAT/303/01
AT: Judge McMullen QC, Ms K Bilgan and Mr D J Hodgkins

ANNUAL LEAVE

On a claim by a police officer, pursuant to his entitlement to annual leave under regulation 13 of t Working Time Regulations 1998, for holiday pay outstanding at the time of his retirement, an employme tribunal found that he could not rely on his actual holiday year which commenced on 1 April because, as was not employed under a contract of employment, there was no "relevant agreement" which provided f a specified date within the meaning of regulation 13(3)(a) and that his annual leave year had to be taken have commenced on 1 October by reason of regulation 13(3)(b)(i).

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the special position of poli constables under the Working Time Regulations 1998 was regulated by regulation 41(1) which provid that for the purposes of the Regulations the holding of the office of constable was to be treated employment under a worker's contract. As the chairman found, the applicant's terms and conditions service were determined by the provisions of the Police Regulations 1995, under which his "leave year" w the period of 12 months beginning on such date as might from time to time be determined by the poli authority, and, by standing order, the annual leave year was from 1 April. Applying the deeming provisi in regulation 41(1), the term as to the applicant's leave year contained in his conditions of service had to b treated as a term of his employment under a worker's contract. Regulation 41(1) was not concerned on with deeming a police constable to be a "worker" for the purposes of the Regulations; it was clear that constable's office was to be treated as employment under a worker's contract. In the present case that wa a contract of employment, applying the first limb of the definition of worker's contract in regulation 2(1 By regulation 13(3) a worker's leave year began (a) on such date as might be provided for in a relevan agreement, or (b) where there was no such applicable provision, 1 October. The issue was whether th applicant could point to a relevant agreement which determined a date for the beginning of his leave yea The respondent submitted that it was a prerequisite of the definition of "relevant agreement" that there wa an agreement between the parties, whereas the Police Regulations did not constitute such an agreemen The standing order could be varied unilaterally by the chief constable. The appeal tribunal preferred th applicant's submission. A contract of employment was by definition an agreement which was legall enforceable between the parties to it. The applicant was deemed to be employed under a worker contract. There was a deemed agreement between the parties. It was common ground that the provisio relied on by the applicant was legally enforceable. It followed that the tribunal fell into error in findin simply that the applicant had no contract of employment. He was deemed to be employed under such contract by virtue of regulation 41(1) and there was a relevant agreement under which the start date was April. The fall back date under regulation 13(3)(b) was not engaged.

Hyman v Chief Constable of South Wales Police; 8 April 2003; EAT/892/02
EAT: Judge Peter Clark, Mr C Edwards and Mrs M McArthur

PRACTICE

An employment tribunal chairman, sitting alone, heard and dismissed complaints by an applicant o breach of contract and unauthorised deduction of wages, without intimating to the parties that she was exercising her discretion to sit alone and without reference to the matters set out in section 4(5) of the Employment Tribunals Act 1996.

LORD JOHNSTON, allowing an appeal by the applicant, said that the applicant submitted that where, on the face of it, at least one of the provisions of section 4(5) appeared to apply, there was a duty on the chairman to exercise a discretion and so to intimate to the parties. The respondents submitted that, properly understood, the discretion that was plainly vested in the chairman under subsection (5) could be exercised at any time and must have been exercised when the original intimation of the hearing stated that the chairman would be sitting alone. They further submitted that, in any event, by proceeding with the case the applicant had either tacitly accepted the position or waived the right to object. The appeal tribunal did not consider that waiver or tacit acceptance could apply in respect of a duty that was mandatorily imposed on the chairman in relation to the exercise of a discretion. The word "proceedings" in section 4(5) meant the actual hearing and, accordingly, it was incumbent on a chairman intending to sit alone where provisions of that subsection might apply to raise the matter with the parties at the beginning of the hearing and, accordingly, exercise his discretion if he continued to sit alone. Since there was no indication of any discretion whatever having been exercised, following the route taken by the Employment Appeal Tribunal in *Harman v Town and Country Veterinary Group* (unreported) 30 May 2001, EAT/71/01, the decision would be quashed and the matter remitted for rehearing before a fresh tribunal, in the expectation that the chairman of that tribunal, if intending to sit alone, would exercise his or her discretion and give reasons therefor at the start of the proceedings.

Dressel v Partnership Housing Ltd; 19 March 2003; EATS/48/02
EAT(Sc): Lord Johnston, Miss J A Gaskell and Mr R P Thomson

RT-TIME WORKER

An employment tribunal upheld claims by an employee that she had been unfairly dismissed and that had been discriminated against as a part-time worker, contrary to regulation 5(1)(b) of the Part-time rkers (Prevention of Less Favourable Treatment) Regulations 2000.

JUDGE PROPHET, dismissing an appeal by the employers, said that the employers submitted that l analysis of what was required to constitute a breach under regulation 5 involved a four-stage process: what was the treatment complained of; (2) was that treatment less favourable than that of a comparable -time worker; (3) was the less favourable treatment on the ground that the worker was a part-time rker; (4) if so, was it justified? They submitted that the employment tribunal had failed correctly to lyse the first three stages, giving far too much emphasis to justification; that a correct analysis would e indicated that the applicant was dismissed not because she was a part-time worker but because the ployers had made a commercial decision to have three full-time employees as accounting assistants; s, she was dismissed on the ground of redundancy. The employment tribunal might not have worked ough the stages with such precision; it was, however, apparent that they were fully cognisant with the tment given by the employers to the applicant and were satisfied that she had thereby been treated less ourably than the comparable full-time accounting assistants. They stated in their reasons that the licant was dismissed simply because she would agree to work only 32·5 rather than 37·5 hours. arly, therefore, they answered the third stage question in the affirmative, and, on the facts they found, could not be a perverse conclusion. In interpreting the 2000 Regulations so as to give effect to their viding protection for part-time workers, an employment tribunal had to see what happened in its full text. Thus, in the present case "the treatment" incorporated the continued pressure on the applicant to k full time, that she would have to work full time if she wished to remain in employment, the selection cess devised by the employers as it applied to the applicant (which meant her dismissal became itable) and, finally, her dismissal. As to justification, the tribunal recognised that it was for the ployers to make a commercial decision that they were overstaffed, but the tribunal were entitled to look ll the circumstances, including that the applicant was a part-time worker who would be only five hours rt of full-time service. Turning to unfair dismissal, the appeal tribunal accepted that, if the employment unal's reasoning was that a breach of the 2000 Regulations meant that the applicant was thereby omatically unfairly dismissed, that would be an error of law. However, the appeal tribunal was sfied from a full reading of the reasons that they did not fall into that error.

Hendrickson Europe Ltd v Pipe; 15 April 2003; EAT/272/02
EAT: Judge Prophet, Mrs R Chapman and Mr C Edwards

ME LIMIT

An applicant employee, who was suffering from ill health and had recently had an operation, posted a ice of appeal from a decision of an employment tribunal, together with the requisite documents, before expiry of the 42-day period for appealing prescribed by rule 3 of the Employment Appeal Tribunal es 1993, but it was received by the Employment Appeal Tribunal one day out of time. He also handed within time, a copy notice of appeal, but it was not accompanied by the tribunal's extended written sons as required by rule 3(1)(c). The Registrar of the Employment Appeal Tribunal, taking account of fact that the appeal tribunal had previously applied the rules relating to receipt of an appeal with per documentation in a lax manner so that the appellant had a legitimate expectation that the appeal uld be accepted, granted the applicant an extension of time on the ground that an exceptional reason been shown why the appeal could not have been presented within time.

BURTON J (PRESIDENT), dismissing an appeal by the respondent employers, said that, plainly, what Registrar had been referring to was not any legitimate expectation on the part the present applicant, but he fact that there had been a lax practice at the Employment Appeal Tribunal, though certainly not in tion to the lodging of a notice of appeal simpliciter within the 42 days. A different practice had rated, however, in relation to situations such as the present where a notice of appeal had been put in in e but it had not been accompanied by the necessary documents—in the present case, the extended sons. That failure rendered the notice of appeal invalid. However, it had been regarded leniently and ensions of time granted. That had to stop, and certainly since the new Practice Direction [*Practice ection* (*Employment Appeal Tribunal: Procedure*) [2002] ICR 122] there had been no application for xtension of time on that basis. The present case signalled the end of any laxity in that regard. The sent case was, however, an appropriate one, not only because of the particular compassionate umstances, but because it would be used as a signal of the end of the previous practice, for the grant, in exercise of the Registrar's decision, of what was only a one-day extension of time. The respondent ployers had raised, but not pursued, a subordinate point on paragraph 3(2) and (3) of the Practice ection, asserting that, contrary to paragraph 3(2) the application for an extension of time had not been le at the same time as the notice of appeal. It was right that there should be such a paragraph in the ctice Direction, because in the normal course—that an appellant was out of time and knew that—there to be an obligation to serve simultaneously the notice of appeal and an explanation for its delay. But agraph 3(2) could not be intended to be wholly prescriptive and exclusive. That could be seen from the existence of paragraph 3(3), which would be unnecessary if paragraph 3(2) were all governing. There would, no doubt, be cases, such as the present, where, when the notice of appeal was despatched, it was n appreciated that it would be out of time, and in those circumstances it was not practicable for it to accompanied by an application for an extension of time. In such cases, when it was appreciated that t notice of appeal had been lodged out of time, it would then become appropriate as speedily as possible follow it up with an explanation in accordance with paragraph 3(2) of the Practice Direction.

Kanapathiar v Harrow London Borough Council; 25 February 2003; EAT/1281/02
EAT: Burton J (President) (heard in chambers and judgment given in open court)

EAL

On an appeal by an applicant against the dismissal by an employment tribunal of her complaints of ngful dismissal, unfair dismissal and failure to pay wages, the appeal tribunal gave directions requiring applicant to lodge an affidavit giving details of alleged bias or improper conduct on the part of the loyment tribunal, in default of which certain grounds of appeal were to be dismissed.

JUDGE PETER CLARK, dismissing an application by the applicant to revoke the requirement to lodge ffidavit, said that the applicant submitted that her grounds of appeal did not raise allegations of *bias* nst the employment tribunal and no requirement for an affidavit arose. Bias not was alleged, but the inds of appeal did allege procedural irregularity amounting to a breach of her right to a fair trial and conduct on the part of the chairman in recording an agreement between the parties which was npletely false". In those circumstances it was right to adopt the affidavit procedure. Like any court or unal the Employment Appeal Tribunal's orders were made to be complied with. In the case of non pliance, by rule 26 of the Employment Appeal Tribunal Rules 1993, the appeal tribunal could order that party in default should be debarred from taking any further part in the proceedings or make such other er as it thought just. That included the power to strike out all or any grounds of appeal. The procedure tained in *Practice Direction (EAT: Procedure)* [2003] ICR 122, para 11 was required to allow the appeal unal to determine as a fact what had taken place below where bias, misconduct or procedural gularity was alleged; that necessarily extended the time for determining the appeal. The approach in *erts v United Friendly Insurance plc* (unreported), 13 June 1996 to accept the word of the chairman as to t had happened below had not survived the guidance given by a very strong Court of Appeal in *kabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, applied in *Facey v Midas Retail Security Ltd* 01] ICR 287, 301, para 35. If the affidavit procedure was to be followed it was essential that parties ply with all directions given. Otherwise unnecessary delay would follow. The applicant further mitted that her case fell within CPR, Part 2, PD.B, para 7A(1), which provided: "A deputy High Court e . . . may not try—(1) a case in a claim made in respect of a judicial act under the Human Rights Act 8 . . ." In the view of the appeal tribunal, para 7A was concerned with claims under section 7(1)(a) of the nan Rights Act 1998 against the appropriate authority. In the present appeal the applicant was not ging a claim against the employment tribunal under that Act, but was seeking to rely on her rights under cle 6(1) of Schedule 1 to the Act in the appeal (section 7(1)(b)). Thus, circuit judges, who coincidentally sat in the High Court, were not prevented from sitting on the Employment Appeal Tribunal, being orised to do so under section 24 of the Employment Tribunals Act 1996, to consider a point raised by a y in the appeal in accordance with section 7(1)(b) of the 1998 Act. The applicant had also challenged practice of ex parte preliminary hearings, submitting that it amounted to a requirement of permission to eal. That was not accepted. The procedure was not akin to the permission system elsewhere, since an er dismissing an appeal, following a hearing, at the preliminary stage was then subject to appeal, with nission, to the Court of Appeal. Section 21(1) of the 1996 Act limited the appeal tribunal's jurisdiction earing appeals on a question of law only. If an appeal was dismissed at the preliminary hearing stage it ld be on the basis that no error of law was made out, and, if that judgment was wrong, it could be ected by the Court of Appeal. While the appeal tribunal continued to use the pre-CPR expression "ex e" in circumstances where the respondent to an appeal had no right of audience at the preliminary ring, save as to directions for the future conduct of the appeal, that procedure, designed to save expense a respondent in an appeal which ultimately failed, did not exclude written representations by the ondent to which the appellant had every opportunity to respond at the oral preliminary hearing.

Riniker v Waymark Holidays Ltd; 30 April 2003; EAT 61/03
EAT: Judge Peter Clark, Mr P R A Jacques and Miss D Whittingham

ISDICTION

A complaint by a civilian member of staff at a police station that she had been sexually assaulted by a ce inspector was heard by a disciplinary board, established in accordance with the Police (Discipline) ulations 1985, which consisted of three male commanders. She complained to an employment tribunal the board had subjected her to sexual harassment in their conduct of that hearing. The employment unal determined as a preliminary issue that the function of the disciplinary hearing was to arrive at a cial, and not an administrative, determination and that thereby it enjoyed absolute immunity from plaints about its conduct of the hearing.

RIMER J, dismissing an appeal by the applicant, said that the question raised by the appeal was ther the disciplinary hearing inquiring into the charge against the inspector constituted proceedings of bunal enjoying the like absolute privilege as was enjoyed by proceedings before a court. The best guide e resolution of the question was the House of Lords decision in *Trapp v Mackie* [1979] 1 WLR 377, in ch Lord Diplock identified four matters which needed to be considered when deciding on which side of the line any particular case might fall. The first was that the tribunal had to be one recognised by la There was no issue about that: the hearing was constituted under the 1985 Regulations. The second matt was the nature of the question into which the tribunal was required to inquire. The issue before th disciplinary hearing was closely analogous to the type of issue which arose in courts of justice. It was in th nature of a trial, under a procedure recognised by law, of a disciplinary charge which could result in a ran of punishments from dismissal to a caution. Its nature was capable of resulting in the proceedings enjoyi absolute privilege. The third matter was the procedure adopted by the tribunal, and the procedu required to be adopted at the disciplinary hearing was also, in its essentials, akin to that adopted by cou trying civil or criminal cases. The fourth matter was the legal consequence of the conclusion reached by t tribunal as a result of the inquiry. The consequences of a decision of the disciplinary tribunal were eith rather close to those of a decision of a court of justice or else were not relevantly distinguishable from th situation in *Trapp*: punishments could be imposed either directly by the board or other officer conductin the hearing, or else on their recommendation. Either way the decision was finally binding on the accuse subject only to any appeal. The essential features of the disciplinary hearing rendered it closely analogo to a judicial proceeding before a court of justice, and the employment tribunal had been correct in the conclusion that the disciplinary hearing enjoyed the same absolute immunity as proceedings before a cou of justice. Though the applicant's complaint was not so much about what was said at the disciplina hearing but about the exclusively male constitution of the board and the failure of the board to contr counsel's questions of her in cross-examination, the immunity extended to such complaints. Though th Sex Discrimination Act 1975 said nothing to the effect that tribunals enjoyed such immunity, the rule was long-standing one of public policy and Parliament could be taken to have been aware of it when enactin the 1975 Act.

Heath v Comr of Police of the Metropolis; 12 May 2003; EAT/454/02
EAT: Rimer J, Mr C Edwards and Miss C Holroyd

TIME LIMIT

A complaint of unfair dismissal, presented by an applicant on 1 June 2001, was held to be out of time where the applicant had accepted, on 2 March 2001, her employers' confirmation that she could retire, on grounds of ill-health, on 28 February 2001.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was acknowledged on behalf of the applicant that *Crank v Her Majesty's Stationery Office* [1985] ICR 1 and *Lambert v Croydon College* [1999] ICR 409 supported the propositions, first, that parties to a contract of employment might agree a retrospective effective date of termination and, secondly, that such agreement was not invalidated by section 203 of the Employment Rights Act 1996. It was, however, submitted that those cases were wrongly decided. Although the Employment Appeal Tribunal was not bound by its previous decisions, in the interests of comity it would normally follow a line of authority that was well settled unless it could be shown that the earlier decisions had been decided without full argument. It had to be assumed that the applicant's contract was terminated by the employers without notice under section 95(1)(a) of the Act. Section 97(1)(b) provided that "in relation to an employee whose contract of employment is terminated without notice" the effective date of termination "means the date on which the termination takes effect". The issue, under section 97(1)(b), was whether as a matter of fact the effective date of termination might be a date retrospectively agreed between the parties. It was submitted that a retrospectively agreed effective date of termination offended the provisions on continuity of employment, in particular section 212(1). It was contended that, on the facts, the applicant's relations with her employers were governed by a contract of employment after 28 February 2001; that the earliest date on which it could be said that the parties had agreed the ending of the contract was 2 March 2001, and the period 28 February to 2 March counted in computing her period of employment by virtue of section 212(1); and that the parties could not abridge that time by agreement, thereby extinguishing a period of continuous employment. The appeal tribunal rejected that submission. If the effective date of termination could be retrospectively agreed that would not offend the continuity provisions, which expressly provided for the effective date of termination as the end date for an employee's period of continuous employment under section 211(1)(b). Where the parties retrospectively agreed the date on which the contract ended that was the effective date of termination. The applicant also relied on section 203 of the 1996 Act, focusing on the words of subsection (1)(a) and submitting that, though the agreed termination date did not exclude the applicant's right to bring an unfair dismissal complaint, it limited that right by reducing the primary limitation period to less than three months. The fallacy in the submission was to *assume* that the true effective date of termination was the date on which the agreement was reached. However, an agreement as to the effective date of termination was no different from the parties agreeing a consensual termination of the contract, which had never been regarded as offending section 203(1). The appeal tribunal had not been persuaded to depart from the principles laid down in *Crank* and *Lambert*. Further, there were practical reasons for continuing to take the line that parties might agree a retrospective effective date of termination, just as they could agree to an extended period of notice. Permission to appeal.

Fitzgerald v University of Kent at Canterbury; 13 May 2003; EAT/474/02
EAT: Judge Peter Clark, Mr A E R Manners and Mr H Singh

MPENSATION

n employment tribunal upheld complaints of unfair dismissal by employees who had been dismissed
wing the transfer to new owners of the pub where they worked but made no separate award for a
re to consult in accordance with regulations 10 and 11 of the Transfer of Undertakings (Protection of
loyment) Regulations 1981. The tribunal also deducted earnings by one employee from another job
rtaken during and after his employment, when calculating his compensatory award.
UDGE BIRTLES, allowing an appeal by the latter employee, said that, on the first matter, the
loyees had to rely on regulation 11(4)(a) of the 1981 Regulations, and the issue, therefore, was what
provision meant. It was argued that it required the employment tribunal to do two things: first, to
e a declaration that there had been a breach of the consultation procedures; and, secondly, to award
opriate compensation as specified in regulation 11(11). The respondent transferees argued that the
uage of regulation 11(4) was quite clear: the tribunal "shall"—and therefore must—make a
aration, but it "may" award compensation—it was not required to do so. In the judgment of the
al tribunal, that was correct. Parliament was to be taken to be well aware of the difference between
nandatory "shall" and the permissive "may". The use of the disjunctive "or" separating paragraph (a)
paragraph (b) of regulation 11(4) did not alter that conclusion. The employment tribunal was fully
led on the facts not to make an award of appropriate compensation under regulation 11(4)(a) if it
ght it could do justice to the case by taking it into account in its award of the compensatory element of
issal. There was no error of law. The final ground of appeal was that the tribunal had erred in law in
ng into account the employee's income from his other job in calculating his award. The loss suffered by
mployee, for the purposes of section 123(1) of the Employment Rights Act 1996, was the loss of his
ly wage paid by the transferor. He did not lose the wages paid by his other job. That payment and
employment had nothing to do with any respondent. It predated the dismissal and continued after it;
s separate employment. Furthermore, the common law duty to mitigate loss under section 123(4)
d not operate so as to enable a tribunal to reduce compensation payable under section 123(1) in the
nt circumstances. The duty to mitigate loss applied only to employment which commenced after
issal. To do otherwise would be to unjustly reward an employer for dismissing an employee who had
nitiative and energy to have alternative employment which predated dismissal. That could not be just
equitable in all the circumstances, and the employment tribunal had made an error of law in adopting
approach.

Iansi v Warne; 20 May 2003; EAT/853/02
AT: Judge Birtles, Mr A D Tuffin and Miss D Whittingham

ABILITY DISCRIMINATION

n employee suffered an injury to his hand while at work, as a carpenter, and, though thereby disabled
he purposes of the Disability Discrimination Act 1995, he wanted to return to work and requested a
period to demonstrate that he was able to perform his duties. The employers carried out a controlled
sment of the employee involving a series of typical tasks, but had doubts about his safety and he was
issed. An employment tribunal upheld a complaint by the employee of disability discrimination on
round that by refusing to allow the employee to return to work for a trial period to see what he could
he employers had failed in their duty to make adjustments under section 6 of the Act and that the
re was not justified.
IR COMMISSIONER HOWELL QC, allowing an appeal by the employers, said that there were two
rate and distinct questions to be asked under sections 5 and 6 of the 1995 Act when a complaint was
e that a failure to make reasonable adjustments in accordance with section 6 had resulted in
imination, so that the detriment to which it gave rise became unlawful conduct on the part of an
oyer of which complaint might be made under section 4. On the first question under section 6(1) the
sment of what steps it was reasonable for an employer to have taken in order to comply with its duty,
whether it had failed, was to be determined objectively according to the tribunal's own view of what
or was not reasonable in the circumstances of a particular case. Having established that there had
such a failure, a tribunal was then required by section 5 to go on and consider the *separate* question
r section 5(2)(b) of whether the employer "cannot show that his failure to comply with that duty is
ied". Only if that separate condition was also met could a finding of discrimination for the purposes
ction 5 be made. That the language used in section 5(2)(b) did require that separate question to be
essed, even in the case of an established failure to do what the tribunal considered reasonable under
on 6, was apparent from *Prison Service v Beart* [2003] ICR 1068 and from the Court of Appeal's
ideration of the identical language in section 5(1)(b) in *Post Office v Jones* [2001] ICR 805. Under that
ling the question of whether the employer could show the defence of justification was not only a
rate one from that of reasonableness under section 6 but one involving a different and (for the

employer) less onerous standard. In particular, the effect of subsections (3) and (4) meant that all that wa to be addressed was whether the reason put forward by the employer as justification was (a) material an (b) substantial. Provided those not very demanding thresholds were met, it was not for the employmen tribunal to substitute its own view on whether it considered that showed a reasonable justification for th treatment or failure in question. The interpretation in *Jones* had to be regarded as binding also for th purposes of section 5(2)(b). On that footing the tribunal's expressed reasons embodied a materia misdirection in that consideration of whether there had been a failure on the part of the employers to tak reasonable steps under section 6 and whether the defence of justification under section 5(2)(b) had bee established was regarded as depending on the *same* circumstances and for practical purposes as the sam inquiry, instead of having to be differentiated with two different tests to be applied. It was apparent tha the tribunal's conclusions depended on their own assessment of what *they* considered it reasonable for th employers to do, and their reasons contained nothing to show that they regarded justification as depending on different questions and a different test or that they were directing themselves to the less stringen standard required by the wording of section 5(2)(b) as laid down in *Jones*.

Royal National Theatre Board Ltd v Collins; 29 April 2003; EAT/642/02
EAT: Mr Commissioner Howell QC, Mr J R Crosby and Mr A D Tuffin

UNFAIR DISMISSAL

An employment tribunal upheld complaints of unfair dismissal made by employees complaining of a failure by their employer to consult with them prior to redundancy but made no award of compensation on the basis that the employees would have been dismissed in any event.

LORD JOHNSTON, allowing an appeal by the employees, said that the employees argued that the tribunal's decision to assess the likelihood of dismissal in any event at 100% was illogical, since it failed to give any effect to what might have been the result of a consultation process if it had been properly carried out. They submitted that the failure of the employer to embark on a fair consultation process was a substantive one, consequently, having an effect inasmuch that there was a denial of opportunity and it could not be said that if that opportunity had been given a different result would not have been achieved. The employer submitted that the issue was one of fact to be determined by the employment tribunal on the evidence. The appeal tribunal agreed that, on the evidence before them, the tribunal were entitled, having determined the issue of fairness, to conclude nevertheless that the employer would be bound to effect the redundancies in any event. However, the appeal tribunal was concerned that the employment tribunal did not consider the question of whether or not the employees' period of employment might have been extended to some extent if the consultation process had been properly carried out. Accordingly, it was appropriate to remit the matter to the same tribunal for them to consider, on the facts they had found proved, whether or not the consultation process might have extended the employment period and, if so, to what extent; alternatively, whether proper consultation would have had the result that the employees would have sought other employment at an earlier date, which might also reflect on the issue of compensation. If the tribunal did so conclude, compensation would be awardable in respect of the relevant loss of weekly pay. If the tribunal determined that the same date would in fact have been achieved because of the attitude of the employer, no compensation would be awardable.

Jardine v Cameron Linn Ltd; 5 June 2003; EATS/50/02
EAT(Sc): Lord Johnston, Mr A G McQuaker and Mr M G Smith

[2003] ICR Part 11

BREACH OF CONTRACT

An employee, who was transferred from typing to clerical duties and lost her typing proficiency payments, made a complaint of breach of contract before her employment terminated, on grounds of ill-health. The employment tribunal held that it had no jurisdiction to hear the claim, as it had not been presented within the three-month period beginning with the effective date of termination of the contract, as prescribed by article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The tribunal also considered whether the claim could be treated as a claim for unlawful deduction of wages under section 13(1) of the Employment Rights Act 1996, but concluded that it could not as it "was plainly and unambiguously expressed as being for breach of contract only".

JUDGE BURKE QC, allowing an appeal by the employee, said that, if the employee's claim was a claim in respect of wrongful deduction under Part II of the 1996 Act, it was at least plainly arguable that it related to a series of such deductions and therefore would have been in time, because it had been presented before the end of the period of three months beginning with the last deduction. Therefore, if such a claim had been before the tribunal, it would have been open to it to find it had jurisdiction. The appeal tribunal agreed with what was said by the appeal tribunal in *Miller Bros & F P Butler Ltd v Johnston* [2002] ICR 744, 749–750, para 26, and that one must not strive to find jurisdiction by an artifice where jurisdiction did not exist. On behalf of the employee it was submitted that the employment tribunal had erred in concluding that her claim could not properly be viewed as a wrongful deduction claim. It was significant that the employers conceded that, if the employee had been compulsorily transferred, she would have had a contractual entitlement to the proficiency payments, and it was submitted that in their notice of appearance the employers had responded directly to that, by setting out in considerable detail the facts on which they based their case that she had transferred voluntarily. The appeal tribunal accepted that the two causes of action or heads of claim were different and that there might be many situations in which a breach of contract claim could not, on any view, be said to be also a wrongful deduction claim. However, in cases in which the employee asserted that she should have been paid moneys to which she was contractually entitled, the claim could be put both in debt, as a claim for moneys due that had not been paid, because there had been a wrongful deduction, and in damages as moneys lost by reason of the employer's breach of contract in failing to pay, which fell within the 1994 Order. Any fair reading of the employee's originating application could only tell the reader that she was asserting that she was contractually entitled to the payments she sought but had not received. The question the tribunal needed to pose was whether in substance the claim was not only one for breach of contract but also for unlawful deduction of wages. Had the employment tribunal properly directed itself to that question, it could only have answered it in the affirmative. The claim did contain a claim for wrongful deduction and the employment tribunal erred in law in dismissing it on the basis that it consisted only of a claim under the 1994 Order, as to which, admittedly, there was no jurisdiction.

Whitmore v Inland Revenue Comrs; 1 April 2003; EAT/727/02
EAT: Judge Burke QC, Mr K Edmondson and Mr D S Smith

EMPLOYER'S INSOLVENCY

The applicant employees were dismissed when their employer ceased trading. The Secretary of State for Trade and Industry refused their applications for redundancy and other termination payments, and an employment tribunal chairman, relying on a statement by a licensed insolvency practitioner, found that the employer was insolvent within the meaning of section 183 of the Employment Rights Act 1996 and made an order in favour of the applicants.

JUDGE PETER CLARK, allowing an appeal by the Secretary of State, said that the issue on the appeal was whether the employer was insolvent within the meaning of section 183 of the 1996 Act. Where an employee was dismissed by reason of redundancy and did not receive a redundancy payment from his employer he could recover payment from the Secretary of State in the circumstances prescribed by section 166(1) of the Act. Insolvency was defined in section 183, and those provisions had been the subject of consideration by the Employment Appeal Tribunal in number of cases. The relevant principle to be derived from those cases was that it was for the employee to establish that the statutory definition of insolvency was satisfied. It was not enough simply that the employer had ceased trading, could not pay his debts or was otherwise in some form of financial difficulty. The Secretary of State had disputed before the employment tribunal that the employer was insolvent within the meaning of section 183. In his extended reasons the employment tribunal chairman purportedly found as a fact that the employer was insolvent. The licensed insolvency practitioner had said so. That was simply not enough. The word "insolvency" had different meanings in different contexts. Precisely what the practitioner meant by that expression was unclear. What was clear was that the practitioner did not mean that the employer was insolvent within the meaning of section 183, because, in reply to questions from the Department of Trade and Industry, the practitioner answered that the employer had not been adjudged bankrupt and had made no composition or arrangement with his creditors. The appeal tribunal did not, however, need to rest its decision on that exchange of letters, because it was satisfied that there was no evidence before the chairman that either of the limbs of section 183(2)(a)(i) had been satisfied. Accordingly, the finding that the employer was insolvent for present purposes could not stand.

Secretary of State for Trade and Industry v Key; 7 May 2003; EAT/1356/01
EAT: Judge Peter Clark, Ms G Mills and Mr J C Shrigley

EMPLOYMENT APPEAL TRIBUNAL

An appeal from an employment tribunal was dismissed by the Registrar of the Employment Appeal Tribunal for failure by the appellants to comply with an order to serve further and better particulars of their notice of appeal which had been made "on paper" and sent by separate letter when the appeal was listed for preliminary hearing.

BURTON J (PRESIDENT), allowing an appeal by the appellants, said that it seemed that the letter enclosing the order for further particulars was never received by the appellants, and so they did not comply with it, though they complied with other obligations and filed a skeleton argument. An order striking out an appeal by virtue of default was a more or less administrative order, but it had very considerable consequences. Unless an order specifically stated that, on failure to comply, the appeal would be dismissed without further notice to the relevant party, there should always be such notice, albeit by reference to a very short time scale, to give the party whose appeal was about to be dismissed the opportunity to make representations. Accordingly, save in the case of an order specifically indicating that no further notice would be given to either party, it was ordinarily appropriate for a judgment in default not to be entered where it was alleged that there had been a failure to comply, without at least checking that the party in question did receive notice of the order. In the present case neither the Registrar nor the respondent to the appeal knew that the appellants had not received the order in question when the order dismissing the appeal was made. When the appellants received the order dismissing the appeal they made an application under rule 33 of the Employment Appeal Tribunal Rules 2001. That appeared entirely appropriate, as rule 33 would apply just as much to a decision made on behalf of the appeal tribunal as to a decision of the full tribunal. In any event the Registrar did not entertain a review under rule 33, but treated the appellants' application as an appeal against her order. Hence the present appeal which had plainly incurred some expenditure of costs on both sides. Where there was an application for a review which was capable of being dealt with "on paper", that course ought ordinarily to be followed, rather than listing inter partes a hearing by way of appeal. Since no fault could be ascribed to the appellants, who otherwise acted diligently in accordance to what they understood to be their obligations and at the earliest opportunity applied for a review, the appeal would be allowed.

Baker & Co v Marenah; 11 June 2003; EAT/77/03
EAT: Burton J (President) (as in chambers)

TEACHER

A teacher was given notice that her employment would terminate, on ill-health grounds, on 30 April 2000, by a letter from the local education authority which she received on 7 February 2000, following a meeting on 3 February of an appeal committee of the governing body of the school where she worked. An employment tribunal dismissed her claims of unfair dismissal and breach of contract.

JUDGE PROPHET, allowing an appeal by the applicant, said that there was no evidence which indicated that there had been a specific notification in writing by the governing body to the local education authority of the governing body's determination and the reasons for it, as was required by the School Standards and Framework Act 1998, Schedule 16, paragraph 25. It could not be accepted that subsequently circulated minutes of the appeal hearing constituted compliance with the statutory procedure. It was difficult to accept that the local authority had been in a position to send the termination notice when it did. However, since both parties accepted the fact of the applicant's dismissal, the question was whether she had received such notice as she was entitled to under her contract. It was common ground that she was on the maximum of 12 weeks for statutory notice purposes and that a notice period under a written notice did not include the day it was received. Thus, the period would begin on 8 February and extend to 1 May 2000, and it was a breach of the applicant's contract for notice to end on 30 April. In the usual way such breach would have little practical effect, but in the case of a teacher special consideration had to be given to the contractual requirement which on the face of it required that notices had to end on one of three specific days. The appeal tribunal accepted the submissions on behalf of the applicant that the effect of the statutory requirement was to modify the contractual terms to substitute 12 weeks for two months, with the requirement for a proper notice to expire on one of the three specific dates remaining intact. Thus, the only proper notice which the applicant could have received on 7 February 2000 was one expiring on 31 August 2000. Common sense suggested that weight should be given to the importance of notices relating to teachers ending at the end of school terms. The employer urged the appeal tribunal to ind, as the employment tribunal had, that the applicant received oral notice through her representative at he appeal hearing on 3 February 2000, or at least by communication prior to 7 February. Employment aw had always stressed the importance of the fact of dismissal being properly communicated to the mployee. It should not arise by inference. Paragraph 25 of Schedule 16 to the 1998 Act made it clear that he local authority representative had been in no position to give notice to the applicant, even if she had een at the hearing on 3 February, because the required written notification by the governing body to the ocal authority had not been given. Notwithstanding the inevitability of the statutory process, notice to the applicant terminating her contract had to been given directly to her by the local authority, and that had occurred at the earliest on 7 February 2000. Consequently there was a breach of contract. The conclusions reached on the present appeal were essentially based on the particular circumstances of the applicant's position, but all education authorities had to be aware that there were strict statutory requirements to follow where the dismissal of a teacher was involved.

Hughes v Governing Body of Archers Court School; 14 January 2003; EAT/1444/01
EAT: Judge Prophet, Mr S M Springer and Mr R N Straker

DISCLOSURE

An employment tribunal upheld a refusal by a respondent local authority to disclose documents relating to, inter alia, the applicant's unfair dismissal complaint, relying on section 49(1) of the Audit Commission Act 1998, which prohibited disclosure of documents obtained by the district auditor unless the person to whom the information related consented.

BURTON J (PRESIDENT), allowing an appeal by the applicant, said that section 49 of the 1998 Act did not have to be construed in the draconian way in which the employment tribunal chairman had construed it. The phrase "No information . . . obtained by the [Audit] Commission or an auditor . . . shall be disclosed" in that section related to (1) documents created by the auditor from information, such as transcripts or notes of, or statements made or drawn up by the auditor or his staff from, information supplied by, or meetings held with, informants, or memoranda or documents prepared by the auditor or his staff resulting from such information or meetings or communications; and (2) documents created by others for the purpose of submission to the auditor or the Commission. Thus, for example, if a would-be informant prepared a statement, created a memo, sent a letter or e-mail, or caused or permitted a lawyer to do so on his behalf, then that document would fall within section 49. In order to construe section 49 compatibly with the Human Rights Act 1998, and in particular with the rights of a litigant in civil proceedings under article 6 of the Convention, such preclusion did not extend to documents the disclosure of which was not otherwise precluded by some privilege but which happened to have been supplied to the auditor, but originals or copies of which *remained* in the possession, custody or power of the person who supplied them to the auditor, from which person disclosure or production was then properly sought. Such documents could not be cloaked with a privilege from production simply because they happened to have been provided to the auditor. If they were disclosable in the hands of the person who supplied them to the auditor *before* he supplied them, then they remained subject to disclosure and the simple fact that they or copies might have been supplied to the auditor during an investigation could not render them precluded from disclosure. Only one of the documents fell within the precluded area; the others would be ordered to be disclosed.

Brennan v Bedford Borough Council; 30 June 2003; EAT/317/03
EAT: Burton J (President)

NOTICE PAY

The applicants, who were carpenters, were contractually obliged to carry out work personally under the direction of the respondents' foremen, mainly using tools provided. They worked under terms whereby the respondent deducted income tax at 18% from their wages and they were responsible to the Inland Revenue for any further tax due. They were paid weekly on the basis of a daily rate but with a bonus for a full week's work. When they were dismissed, they made claims for unlawful deductions in respect of, inter alia, holiday pay and pay in lieu of notice. The employment tribunal chairman found that the applicants were "workers" for the purposes of regulation 16(1) of the Working Time Regulations 1998, and so entitled to holiday pay, but that they were in an intermediate category of workers able to look after their own interests when it came to holiday pay which was rolled up in the agreed rate of pay; and that they were not "employees" for the purposes of section 86 of the Employment Rights Act 1996, and so not entitled to the notice periods there provided.

JUDGE REID QC, allowing an appeal by the applicants, said that as a matter of economic reality the applicants were employees. They bore no risk; their pay was on a time basis; they were not paid by output. While the applicants were accepted by the Inland Revenue scheme, it did not automatically follow that they were not employees. There was no indication that any real thought had been given to their status, and the fact that they were working under the scheme should not be regarded as of any great significance. When all the other factors were taken into account, the relationship between the respondent and the applicants, properly analysed, was one of employer and employees. Accordingly, on that basis they were entitled to an award of one week's pay in lieu of notice. If, as the chairman found, the applicants had been workers but not employees, their claim would have failed for want of jurisdiction. When a worker was taken on for an indefinite period to work on a job, it was implicit in his engagement that it would not be terminated without cause except on reasonable notice. What amounted to reasonable notice would depend on the circumstances. The reasonable period of notice in the applicants' case, had they been workers but not employees, would have been one week, and they would have been able to recover an amount equal to one week's wages by way of damages for breach of contract; but that recovery would have had to have been in the county court. In respect of the holiday pay, the appeal tribunal differed from the tribunal chairman. There was no agreement that the applicants' pay included any provision for rolled up holiday pay. The only reference to it was in a document headed "Registration & Safety Card", which was produced after they had been engaged and their terms fixed. Even then they were not given copies. It could not vary the previously agreed terms.

McCarthy v Blue Sword Construction Ltd; 14 July 2003; EAT/223/03
Judge Reid QC, Mr B V Fitzgerald and Mrs T M Prosser

STRIKING OUT

Prior to the hearing of an unfair dismissal complaint, an employment tribunal received a letter from the applicant employee alleging threatening behaviour by the employer towards him. The tribunal decided to treat the letter as an application to debar the employer. When the application came on for hearing the employer was not present, as he had not been given notice, and the tribunal found that he had conducted the proceedings in a way that was unreasonable and, pursuant to rule 15 of the Employment Tribunals Rules of Procedure 2001, struck out his notice of appearance. The tribunal later set the order aside and had a further hearing of the application with the employer present, when it again concluded that the employer's behaviour had been unreasonable and ordered the notice of appearance to be struck out. It went on to hear the complaint without allowing the employer to take part in the proceedings and found that the applicant had been unfairly dismissed.

BURTON J (PRESIDENT), allowing an appeal by the employer, said that the course taken by the tribunal was inappropriate. Once it was apparent that it was not the employer's fault that he had not attended the first hearing it should have been treated as a nullity and the case restarted. On that basis alone the decision to strike out the notice of appearance could not stand. Two possibilities arose as to the order debarring the employer from defending the applicant's unfair dismissal claim: either a rehearing by an employment tribunal of the question whether the employer should be debarred from defending the case, or the appeal tribunal reaching its own decision on the debarring application. The power under rule 15(2)(d) of the Rules of Procedure only arose if either the tribunal had sent a notice to the relevant party or he had been given an opportunity to show cause orally by virtue of rule 15(3). Because of the unsatisfactory nature of the two-part hearing that had occurred in the present case, there would have been a very substantial question as to whether it could be said that the employer had been given such an opportunity simply by virtue of his having been allowed in to the second part of the hearing, not having heard the first part. But, quite apart from procedural matters, there were questions requiring to be decided by a tribunal properly faced with an issue under rule 15(2)(d). First, there had to be a conclusion not simply that a party had behaved unreasonably but that *the proceedings had been conducted* by or on his behalf unreasonably. It was clear that there had been no such finding by the employment tribunal. It might well be that, on appropriate facts, a tribunal might find that a threat that unless proceedings were withdrawn some course could be taken amounted to a scandalous method of conducting the proceedings. Secondly, it was plain from *De Keyser Ltd v Wilson* [2001] IRLR 324 that, in ordinary circumstances, even assuming a finding that proceedings had been conducted scandalously, unreasonably or vexatiously, before there could be a strike out of a notice of appearance, or originating application, there had to be a conclusion as to whether a fair trial was or was not still possible. The reason for that question was that a striking out order was not simply regarded as punishment. Thirdly, once it had been concluded that the proceedings had been conducted in breach of rule 15(2)(d) and that a fair trial was not possible, there still remained the question as to what remedy the tribunal considered appropriate, which was proportionate to its conclusion. It was also possible that there could be a remedy, even in the absence of a conclusion that a fair trial was no longer possible, which amounted to some kind of punishment, but which, if it did not drive the party from the judgment seat, might still be an appropriate penalty to impose, provided it did not lead to debarring the party from the case in its entirety. Fourthly, even if the question of a fair trial was found against the party, the question still arose as to consequence. Any tribunal making an order had to ask what the appropriate consequence was. As a result of rule 3(3) a respondent who had not entered an appearance was not entitled to take any part in the proceedings, but that did not prevent the tribunal, pursuant to its case management powers under rule 4 or its powers to regulate its own procedure under rule 15, making appropriate and proportionate orders. An option might be to debar a respondent from taking any further part in the liability hearing but permit him to probe the applicant's case on compensation. Those four steps had not been taken in the present case. Even assuming there was some evidence that there was behaviour by the employer which could amount to unreasonable conduct of the proceedings, it was impossible to conclude that a fair trial of the unfair dismissal complaint was not possible or was in any way inhibited by what had occurred. In those circumstances, it was not appropriate to delay the matter further, and the employment tribunal's decisions would be set aside and the unfair dismissal claim remitted for a hearing before a different tribunal.

Bolch v Chipman; 19 May 2003; EAT/1149 & 1150/02
EAT: Burton J (President), Mr J Hougham and Mr A D Tuffin

TRANSFER OF UNDERTAKING

An employment tribunal held that the second respondent, the transferor of a cleaning contract, had failed to consult with the applicant employee prior to the transfer, in breach of its duty under regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 and ordered it to pay compensation on the basis that liability had remained with the transferor rather than having passed on transfer to the second respondent, the transferee.

BURTON J (PRESIDENT), allowing an appeal by the transferor, said that the conclusion of the Employment Appeal Tribunal in *Transport & General Workers' Union v McKinnon, J R Haulage Ltd* [2001] ICR 1281 was that liability for a failure to consult did not transfer to a transferee under regulation 5(2) of the 1981 Regulations. The appeal tribunal in that case referred to *Kerry Foods v Creber Ltd* [2000] ICR 556 and distinguished it. But it was plain that the two decisions were inconsistent. The ordinary practice of the appeal tribunal, given that it was not bound by its own previous decisions, was that it had to find previous decisions of its own heavily persuasive, as uncertainty would be created if it easily departed from its earlier decisions. As a matter of ordinary precedent and practice, the tribunal below would follow the more recent of two inconsistent decisions of the appeal tribunal, provided it was clear that one or other of them was not per incuriam. *McKinnon* and *Kerry Foods* were inconsistent by virtue of a question of approach and a conception of policy. If one looked behind regulation 5 to Council Directive 2001/23/EC, it seemed difficult to see how an obligation of an employer to consult in relation to the potential transfer of a contract of employment was not an obligation "arising from an employment relationship existing on the date of transfer". What appeared to have motivated the appeal tribunal in *McKinnon* was a policy question which caused them to construe regulation 5(2) in order to achieve the best purpose of safeguarding an employee's rights. There was plainly an important balance to be reached. On the one hand it could be said that the best protection for an employee to ensure that he was consulted prior to a transfer was to ensure that the obligation was on and remained with the transferor. On the other hand it could be said that if there was a breach the best way of protecting the employee was to make sure that he was compensated, and, in the ordinary case, the best way was to ensure that the obligation transferred to a transferee who had the business and the assets and was likely to be solvent. Any securing of the position of the innocent transferee could ordinarily be done by its obtaining warranties from the transferor. The present case was allowed to proceed in the light of the two inconsistent decisions. Meanwhile, however, *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829 was decided by the Employment Appeal Tribunal, which carefully considered the two previous decisions and reviewed their inconsistencies, resolving the inconsistency firmly in favour of liability transferring under regulation 5(2). There was no reason to differ from that decision. For the purposes of certainty, it was right that people should know that, subject to any higher court considering the matter, the law was as stated in the *Alamo Group* and *Kerry Foods* cases and not as stated in *McKinnon*.

Blue Diamond Services Ltd v McNeish; 20 May 2003; EAT/1354/01
EAT: Burton J (President), Mr D Norman and Mrs R A Vickers

COMPENSATION

An employment tribunal held that the applicant had been unfairly dismissed as she was about to start maternity leave by reason of her pregnancy and awarded total compensation of £18,050, holding that, after the period of maternity leave, she had taken reasonable steps to find work and that she would have been able to return to equivalent earnings within a period of six months of the hearing.

JUDGE ANSELL, allowing an appeal against quantum by the employer, said that the employer submitted that, when awarding the applicant her past and future losses for the six-month period, the tribunal should have assessed the chances that she would not have returned to that job in any event and cited *Ministry of Defence v Cannock* [1994] ICR 918. There was nothing in the documentation from the tribunal to suggest whether that issue had been raised or whether they considered it. The tribunal also seemed not to have given consideration to *Polkey v A E Dayton Services Ltd* [1988] ICR 142. Though they found it to be a very serious case involving glaring omissions in terms of proper redundancy procedures, it still required a tribunal to go through the process of making assessment as to whether, if proper procedures had been adopted, the applicant would in fact have been selected. The employer should be allowed to raise such important principles, and when the matter was remitted to the tribunal they would have to consider them. The tribunal also appeared to have failed to discount childcare costs when making a comparison between that which the applicant would have earned if she had returned to work and that which she actually did earn. *Cannock* made clear that that was something a tribunal had to do. Also, there was a reference in the papers to a possibility that the applicant had applied for benefits but there was no formal recoupment order and the tribunal should consider that aspect of the matter. A further issue related to what was said to be double counting in respect of allowing loss of earnings from the point of dismissal and also awarding a sum for wrongful dismissal, in other words, failure to give proper notice. The appeal tribunal did not see any conflict in making those two awards. If payment in lieu of notice had been paid, the applicant could have gone out and found another job straight away. The final head of appeal related to the award for injury to feelings of £7,000. In the light of the guidance given in *Vento v Chief Constable of the West Yorkshire Police* [2003] ICR 318, there was no reason to interfere with the tribunal's award. The tribunal were entirely justified in regarding it as a serious case which would fall within the second *Vento* band. The case would be remitted for consideration of the issues identified. The applicant had put in a cross-appeal, but her solicitors appeared thereafter to have done precious little to pursue the matter, though at no stage had they actually withdrawn it, and they had not appeared on the appeal. The employer's solicitors had attempted to separate their costs referable entirely to the cross-appeal, and there would be an award of £350 against the applicant in respect of those costs.

S & B Car Hire Kent Ltd v Wallington; 28 August 2003; EAT/246/03
EAT: Judge Ansell, Mr B R Gibbs and Mrs R A Vickers

COSTS

Following the dismissal of their sex discrimination claims, the applicants were ordered by the employment tribunal to pay costs pursuant to rule 14(1) of the Employment Tribunals Rules of Procedure 2001 on the ground that the conduct of their representative in bringing the proceedings was misconceived.

LORD JOHNSTON, allowing an appeal by the applicants, said that it had to be recognised that rule 14(1) of the 2001 Rules of Procedure amended the previous rule, rule 12 of the Employment Tribunals Rules of Procedure 1993, by adding in the words "or a party's representative" and the phrase "or the bringing or conducting of the proceedings by a party has been misconceived". Thus there had been a fairly radical alteration to the previous rule, in respect of which a certain amount of case law had built up. It also had to be noted that in regulation 2(2) of the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001 "misconceived" was defined as including "having no reasonable prospect of success". The appeal tribunal did not consider that *Benyon v Scadden* [1999] IRLR 700 was relevant to the present issue as to the proper interpretation of the new rule 14 because of the change in wording. As a matter of statutory construction the insertion of the words "or a party's representative" had to have had a purpose in the mind of the draftsman, and, given the existence of *Benyon* which applied conduct of a representative to any aspect of the old rule, the intention was to restrict the issue of conduct of the representative to the only limb to which it was attached. In other words, it was relevant for a tribunal to consider how a party's representative had conducted the proceedings as part of the question whether the test established by the adverbs in the second branch of the rule [acting "vexatiously, abusively, disruptively or otherwise unreasonably"] had been met. It accordingly followed that it was not relevant to consider the conduct of a representative in relation to the third limb ["the bringing or conducting of the proceedings by a party has been misconceived"]. The proper test in that respect had to be, looking at the matter objectively, whether the applicant's case had any reasonable prospect of success, either at the time of conception or during the course of its currency. The phrase "or conducting of the proceedings" in the third limb raised a difficulty as a matter of construction, but, properly understood, it must be meant to embrace a notion that, even if a case had reasonable prospects of success at the start, it might develop in such a way that those prospects disappeared. Thus it was possible for the tribunal to consider the issue not only at the time of inception, but also during the currency of the case right up to its conclusion. The question was not directed to issues of fault or blame but simply imposed an objective assessment of all the circumstances of the case. If that approach was correct, it was plain that the employment tribunal misconstrued the test to be applied to the third limb, having not even addressed the issue of no reasonable prospects of success. It was not appropriate to remit the matter for further consideration, given that a decision had been reached, which might cause the tribunal to prejudge the issue if it was being reconsidered, and the decision on costs would be quashed.

Hosie v North Ayrshire Leisure Ltd; 2 October 2003; EATS/13/03
EAT(Sc): Lord Johnston, Miss S B Ayre and Miss A Martin

DISABILITY

An applicant complaining of disability discrimination, in answer to the question "what physical or mental impairment did she suffer from which she claims is the basis of her disability?", replied that she suffered from hypothyroidism and tinnitus. On a preliminary hearing to determine whether the applicant had a disability within the meaning of the Disability Discrimination Act 1995, the employment tribunal stated that the applicant had to establish that her symptoms were attributable to hypothyroidism, but that she had failed to produce sufficient evidence to satisfy them that that was the case, and they dismissed her complaint.

BURTON J (PRESIDENT), allowing an appeal by the applicant, said that the first question the tribunal ought to have addressed was not the cause of any impairment, but simply whether the applicant had an impairment. The applicant submitted that what she was saying was that she had an impairment, namely the physical symptoms of balance impairment, difficulty in climbing stairs, fatigue, etc, and that the tribunal should not have found it determinative of the question as to whether the applicant was disabled that they were satisfied that the symptoms of which she was complaining were not due to hypothyroidism. The appeal tribunal were satisfied that the employment tribunal had not asked or answered sufficient questions. Though, on the evidence before them, the tribunal were entitled to say that the symptoms were not due to hypothyroidism, they did not go on to answer the questions: (1) whether the applicant did have an impairment not caused by hypothyroidism, or (2) whether there was any deduced effect of the hypothyroidism. Simply to give the short answer that the tribunal did give, that the symptoms were not attributable to hypothyroidism, was not the same as saying that the applicant had no physical impairment. The issue of what the cause was of a physical impairment was always going to be of importance, and might lead to the conclusion, if there was no apparent cause, that the impairment was not genuinely a physical one but psychosomatic, or, possibly, to the question of whether there was any likely long term effect in the impairment, but it was not the same question, but a different and only an evidential one. It would be unfortunate if any conclusion to which the appeal tribunal came discouraged the need for an applicant to adduce medical evidence, because without medical evidence it was extremely unlikely that someone who simply asserted that he was having some physical difficulty or other would be able to establish, even if he could support prima facie the existence of some physical impairment, the other requirements of the Act. The matter would be remitted for further consideration by the same tribunal.

MacIver v Capita Business Services Ltd; 16 May 2003; EATS/65/02
EAT(Sc): Burton J (President), Mr A J Ramsden and Miss A Martin

EVIDENCE

An employment tribunal, hearing a complaint of unfair constructive dismissal, rejected an objection by the employers' representative to proposed evidence in chief by the employee alleging that the employers had committed fraud, which had led to his resignation.

BURTON J (PRESIDENT), allowing an interlocutory appeal by the employers against the ruling, said that the test of admissibility was whether the evidence to be given was relevant, but it had to be borne in mind that if evidence was given it would be given in public, there being no apparent availability of a restricted reporting order. Where there was an allegation of fraud or criminal conduct, it had to be proved, albeit on a civil basis, to a higher standard, and certainly had to be fully particularised. In that kind of area there was always, in an appropriate case, the question arising of privilege against self-incrimination, and any party had to be given an adequate opportunity to consider that aspect. Tribunals were subject not only to the ordinary principles of fair play well known to the civil courts, but also to considerations of article 6 of the European Convention on Human Rights. Finally, there was the obligation owed to the court as well as to the parties by advocates as a result of their professional codes of practice. That involved considerations of propriety in relation to the asking of questions. If an allegation was to be made of fraudulent conduct, for example, in cross-examination, clearly an advocate would not dream of putting a derogatory question without some kind of evidential basis in his possession for doing so. If there was no such basis, other than reasonable suspicion, it could be done by way of a straightforward question which did not expect the answer "Yes" or "No" and which certainly did not involve, in the framing of it, any allegation which made it look as though the advocate asking the question had any information to support it. If the advocate had information available, then in most cases it ought already to have been disclosed and ought, in any event, to be adduced at some stage so that it could be set against the answers to the question put and itself tested. That was the more important where the hearsay was strictly not inadmissible as in employment tribunals. Very new evidence, or at any rate new allegations, that had arisen justified the appeal tribunal interfering with the discretion of the employment tribunal, to the extent of concluding that the objection had been well founded, not necessarily as a matter of principle, but certainly on the basis that such questioning should not have proceeded without further appreciation of its legal, jurisprudential and evidential basis. To that extent the tribunal were premature in concluding that it was appropriate to allow the evidence to come out in chief, rather it would have been appropriate to inquire as to what the nature of the evidence would be and whether it could ever be admissible and, if so, what it was, then to make a decision as to the stage at which it would become admissible, if it would be ever so.

Sir Robert McAlpine Ltd v Telford; 13 May 2003; EATS/18/03
EAT(Sc): Burton J (President), Mr M R Sibbald and Mr R P Thomson

DATE OF TERMINATION

On Friday 13 September 2002 an employee faxed a letter to his employer's office, which was received on the fax machine there at 8.21 pm, by which he asserted a repudiatory breach by the employer of his contract of employment and accepted that repudiation "as a resignation, effective forthwith". An employment tribunal found that, although there was no evidence that the letter was read until some time in the following week, the effective date of the employee's dismissal was 13 September and his complaint of unfair dismissal, presented on 13 December 2002, was out of time.

JUDGE RICHARDSON, dismissing an appeal by the employee, said that the employee submitted that, where an employer committed a fundamental breach such that an employee was entitled to terminate his contract, the employee had to elect to terminate the contract and that such an election had to be communicated to the employer and was not effective until it was communicated. It was accepted that communication by fax would suffice for that purpose. The employer submitted that communication by fax outside office hours was sufficient. The appeal tribunal had concluded that the effective date of termination for the purposes of unfair dismissal would not necessarily be the date yielded by an analysis following classical principles of contract law. Often the two dates would be the same, but the scheme of the Employment Rights Act 1996 was in certain respects simpler and more straightforward. Subtle legalities had to take second place to what an employee would commonly understand. If the effective date of termination was the date on which the fax was received in the employer's office, a sensible result was achieved. The date was the date on which the employee, having made his election, communicated it in the clearest terms. As the employment tribunal found, he intended to resign with effect from that date, and no longer considered himself bound from that date. If receipt of the fax was insufficient to fix the date of termination, the employee could not with certainty know what date it was. It might have been as late as 16 September, when the office opened on the Monday. But if an authorised member of staff had read it on the Friday, Saturday or Sunday, the date would be earlier; so the employee could not sensibly rely on the date being later than 13 September. It would reflect the intention and purpose of the 1996 Act, and follow the approach of the Employment Appeal Tribunal in *Robert Cort & Son Ltd v Charman* [1981] ICR 816, to hold that where an employee communicated his immediate acceptance of a repudiation by fax, the effective date of termination was the date of receipt of the fax, not any later date when it was read or acted on.

Potter v R J Temple plc (in liquidation); 18 December 2003; EAT/478/03
EAT: Judge Richardson, Mr P Dawson and Ms N Sutcliffe

PARTIES

An applicant employee made complaints of unfair constructive dismissal, wrongful dismissal and unlawful deduction from wages, naming as the sole respondent the company by whom he had been employed as a director. When the complaints came before the employment tribunal, the company was not present or represented, and the tribunal upheld the applicant's claims. The tribunal formed the view that the company secretary and a co-director had taken concerted action to force the applicant out of the company and took "the unusual course" of making the award against the two individuals as well as the company. The two individuals were subsequently joined as respondents and a review hearing was held at which the tribunal confirmed its original decision, concluding that limiting liability to the corporate employer would be an unduly restrictive interpretation of section 112(4) of the Employment Rights Act 1996 and that on the facts as found the two individuals could not hide behind the corporate structure.

JUDGE PETER CLARK, allowing an appeal by the individual respondents, said that the question was whether the employment tribunal had power to make separate awards against the appellants as well as the company in respect of any or all of the successful claims brought by the applicant. The general statement of the law as to directors' liability in *Halsbury's Laws of England*, vol 7(1), para 616, was that creditors of a company have no remedy for breach of contract by the company against directors, save in cases whereby under the company's memorandum the directors' liability was unlimited; nor were directors liable in negligence save where particular circumstances existed. It was not open to the employment tribunal to find the appellants jointly and severally liable together with the corporate employer, it not being found that they were the applicant's employer. In the case of the claims under the Employment Rights Act 1996 it was absolutely plain that a complainant's redress was against the employer only. In the breach of contract claim, justiciable in the employment tribunal by virtue of section 3(2) of the Employment Tribunals Act 1996 and article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the claim was in contract, the parties to the contract of employment were the applicant and the corporate employer, and his claim was against that employer only. The orders against the appellants would be set aside.

Mack v Allen; 20 November 2003; EAT/672 & 673/03
EAT: Judge Peter Clark, Mr D J Hodgkins and Mr S M Springer

PRACTICE

An employment tribunal gave extended reasons, for its decision to award an applicant employee the sum of £133,730 compensation for unfair dismissal and disability discrimination, which provided little or no explanation of the reasoning as to why a particular conclusion had been reached under each particular head of claim.

LORD JOHNSTON, on an appeal by the respondent employers, said that the employers argued that the employment tribunal had failed to satisfy the tests enunciated in *Meek v City of Birmingham District Council* [1987] IRLR 250 and *Tran v Greenwich Vietnam Community Project* [2002] ICR 1101 to the effect that in simple terms the parties had to know from the reasoning of the tribunal why they had won or lost. The appeal tribunal were entirely satisfied that the way the tribunal had approached the matter was wholly inadequate when it came to the issuing of reasons for the various heads of claim that it had allowed. The tribunal had more or less arrived at a conclusion and it was quite impossible to divine what particular aspects of the various arguments had found favour with it. The question arose as to what should be done. The appeal tribunal could allow the appeal and remit the matter to a freshly constituted tribunal to reconsider the whole question of remedy, as the employers urged, or go down the line which had been brought forward by the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2003] IRLR 710, 714, para 25: "If an application for permission to appeal on grounds of a lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing on notice to the respondent." While recognising that that was a personal injury case and that it was looking at the matter at the time of considering leave to appeal, the appeal tribunal did not consider either distinction was relevant in the present case. The employers argued that if that line was followed their position might be prejudiced in the context of a fair hearing because of the fact that there might be opportunity for re-argument or reconsideration contrary to their interests. That was a valid point, but, when weighed against the appalling prejudice that would be suffered by the employee if the matter had to be started again, there was no justifiable reason at the present stage not to follow the *English v Emery Reimbold & Strick Ltd* route. If after the exercise had been completed the employers felt that they had been prejudiced by the exercise, they would have the right reserved to them so to argue at a further hearing before the appeal tribunal. Accordingly, the appeal would be adjourned for the matter to be remitted to the same tribunal so the chairman might amplify, clarify and give reasons for each of the findings the tribunal made in respect of each head of claim.

Bax Global Ltd v French; 20 October 2003; EAT/596/03
EAT: Lord Johnston, Mrs M McArthur and Mr D Norman

PRACTICE

After the conclusion of the evidence in a race discrimination case, an employment tribunal directed the parties to supply brief written submissions to the tribunal by a specified date but there was no direction for their exchange. The parties sent their submissions to the tribunal without serving them on the other party, and the tribunal reached its decision, in favour of the employers, without the parties having had the opportunity to respond to their opponents' submissions.

JUDGE BIRTLES, dismissing an appeal by the applicant employee, said that in *Barking and Dagenham London Borough Council v Oguoko* [see Recent Points [1999] ICR Part 9] the Employment Appeal Tribunal held that failure by an employment tribunal to cross-serve final written submissions was a breach of the rules of natural justice and that such breach could be cured by subsequent action by the employment tribunal. In *Oguoko* the action taken by the tribunal on a review was to write to each party asking how their representations would have changed or been extended if submissions had been exchanged. Having received a response, the tribunal took the view that any further comments would have made no difference to its decision. In other words the breach was cured by the action of the tribunal. In the present case no application for a review had been made. It was not sufficient for a party to submit that there had been a breach of the rules of natural justice by an employment tribunal, whether by a failure to refer the parties to an authority on which it intended to rely or by a failure to cross-serve parties' written submissions and invite comments thereon. A technical breach of the rules of natural justice could not inevitably result in an appeal being allowed with the remission of the case for a full fresh hearing before another tribunal. The appeal tribunal agreed with, and applied, *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449 to the facts of the present case. In order to succeed in the appeal the appellant applicant needed to show that she had suffered something which was "seriously irregular and unfair" (per Ward LJ, at p 1458, para 28) or "substantial unfairness" (per Buxton LJ, at p 1462E, para 49). The applicant could only point to two matters she would have wished to comment on, and the appeal tribunal could find no serious irregularity or substantial unfairness in relation to either matter.

Mayo-Deman v Lewisham College; 8 December 2003; EAT/104/02
EAT: Judge Birtles, Mr P A L Parker and Mrs M T Prosser

APPEAL JURISDICTION

An employment tribunal awarded an employee compensation of £500 under section 11 of the Employment Relations Act 1999 for a breach by the employers of her right, in section 10 of the Act, to be accompanied at a disciplinary hearing.

JUDGE RICHARDSON, dismissing an appeal by the employers, said that section 10 of the 1999 Act introduced the right for a worker to be accompanied if he was required or invited by his employer to attend a disciplinary or grievance hearing. If the employer failed to comply with his duty under section 10, the employee could make a complaint to an employment tribunal under section 11, and if the employment tribunal found the complaint well-founded it had to order the employer to pay compensation not exceeding the modest sum of two weeks' pay. The employee had taken the point that the Employment Appeal Tribunal had no jurisdiction to hear the appeal. The appeal tribunal had limited jurisdiction, conferred by or under section 21 of the Employment Tribunals Act 1996. In regard to employment tribunals, its jurisdiction was conferred by section 21(1). As section 21(3) made clear, jurisdiction to hear such appeals might be conferred by other statutes; but it was plain from section 21 that the appeal tribunal did not have jurisdiction over employment tribunals unless there was a statutory provision conferring that jurisdiction. The list of proceedings in section 21(1) was defined by reference to the statute or regulation which conferred jurisdiction on employment tribunals to hear proceedings. The list was lengthy. The full range of an employment tribunal's daily work was covered; but the Employment Relations Act 1999 was not in the list. So section 21(1) did not confer jurisdiction to hear an appeal against a decision on a complaint under section 11 of the 1999 Act; nor did the 1999 Act itself; nor did any other statute. There was simply no jurisdiction to hear an appeal on a complaint under section 11. So extensive was the jurisdiction of the Employment Appeal Tribunal to hear appeals from employment tribunals that it was not surprising if practitioners overlooked that point. Moreover, there was a reported case of the Employment Appeal Tribunal under section 11: see *London Underground Ltd v Ferenc-Batchelor* [2003] ICR 656. Since the Employment Appeal Tribunal, though a superior court of record, was a court of limited statutory jurisdiction, no earlier mistake, agreement, order or failure to take the point could confer jurisdiction. It was the duty of the appeal tribunal to decline jurisdiction.

Refreshment Systems Ltd (trading as Northern Vending Services) v Wolstenholme; 27 October 2003; EAT/608/03
EAT: Judge Richardson, Mr I Ezekiel and Ms J Drake

COSTS

Following his dismissal in November 2002, an employee formally requested a written statement from his employer giving particulars of the reasons for dismissal, pursuant to section 92(1)(a) of the Employment Rights Act 1996. On 2 December 2002 the employer's solicitors refused to provide reasons, saying that the employer was not required to do so. On 15 January 2003 the employee presented an originating application, claiming a declaration based on his understanding of the real reason why he was dismissed. On 5 February 2003 the employer lodged its notice of appearance which did not set out any reason for dismissal or suggest that any was to be provided. Finally, on 26 March 2003 the employer's solicitors wrote setting out the reasons for dismissal. An employment tribunal chairman allowed an application by the employee for costs from 2 December 2002 (on the ground that the employer and its representatives had acted vexatiously and otherwise unreasonably), rejecting the employer's submission that he had no power to award costs prior to the commencement of proceedings.

JUDGE RICHARDSON, allowing an appeal by the employer, said that the employment tribunal's power to award costs, in rule 14 of the Employment Tribunals Rules of Procedure 2001, was founded on a finding as to the way a party had brought or conducted proceedings. The conduct of a party prior to proceedings or unrelated to proceedings could not found an award of costs. It was necessary for there to be a causal relationship between the conduct of a party in bringing or conducting proceedings and costs which were awarded under rule 14. It followed that the employment tribunal had no power to award costs against a party until the time the party had brought, or conducted, proceedings. The chairman had erred in law in awarding costs from 2 December 2002. An employment tribunal, having found fault in the conducting of proceedings, needed to examine carefully what loss was attributable to that conduct. It could make a broad assessment, but it could not backdate its award to include costs which were not attributable to that conduct. The employer's second line of submission was that its conduct in the course of the proceedings could not be characterised as vexatious or unreasonable. Concentrating on the period which began with the lodging of the notice of appearance, a notice of appearance was required to set out sufficient particulars to show on what grounds a party resisted the proceedings. The notice in the present case did not set out any case about the reason for the dismissal, nor say that it was intended to give a reason for dismissal. If it had done that, subsequent costs would have been avoided. It was not reasonable to file a notice of appearance which was effectively a holding notice in the hope of deflecting the need to comply with a statutory obligation. Once proceedings had begun, the time for prevarication was over. It was plainly unreasonable to continue to prevaricate. Therefore, the chairman's error in awarding costs prior to the notice of appearance did not invalidate his conclusion relating to the proceedings thereafter. The matter would be remitted for rehearing to establish the costs attributable to the employer's unreasonable conduct from the time of the notice of appearance. In so doing the chairman should have regard to principles of the kind set out in the Civil Procedure Rules.

Health Development Agency v Parish; 24 October 2003; EAT/543/03
EAT: Judge Richardson, Dr S R Corby and Mrs M V McArthur

EMPLOYEE

An employment tribunal held, as a preliminary issue, that an applicant was not an employee for the purposes of pursuing a complaint of unfair dismissal against the respondent company under the Employment Rights Act 1996. The applicant had entered into two fixed term agreements, one with three associated companies of the respondent company ("the advisory agreement") and one with the respondent company, on the same day. Both required the applicant to provide advice, assistance and support for two particular investment opportunities. The advisory agreement provided that he was to be paid a daily retainer and expenses and the other agreement had attached to it a document entitled "Terms and Conditions of Fixed Term Employment". The employment tribunal held that there was no enforceable contract between the parties, merely "a documentary trail which did no more than reiterate the obligations which the applicant was already under and being paid for pursuant to the advisory agreement". The Employment Appeal Tribunal allowed an appeal by the applicant and remitted the issue to be reheard.

MUMMERY LJ, dismissing an appeal by the respondent company, said that the appeal tribunal had pointed out that the employment tribunal did not hold that the "employment document" was a sham and it spelt out a large number of terms and conditions which were consistent with a contract of employment, even though they did not include provisions as to remuneration. His Lordship could not be persuaded that the poorly reasoned decision of the employment tribunal could stand. The decision that there was no contract between the company and the applicant failed properly to address the obvious fact, which was central to the determination of the applicant's relationship with the company, that the two contemporaneous agreements made between the related parties needed to be read together. The combined effect of the documents had to be ascertained by construing their provisions in the context of all the surrounding circumstances. The employment tribunal had erred in law in failing to conduct that exercise.

MAY and **PILL LJJ** concurred.

Emerging Markets Partnership (Europe) Ltd v Bachnak; [2003] EWCA Civ 1876
CA: Pill, Mummery and May LJJ; 19 December 2003

PRACTICE

An employment tribunal chairman refused applications by the respondent to a complaint of unfair dismissal (1) to postpone the hearing of the complaint, and (2) to hold a preliminary hearing into a claim that matters within the originating application were privileged.

JUDGE McMULLEN QC, dismissing an appeal by the respondent against the refusal to postpone and allowing an appeal by the respondent against the refusal to hold a preliminary hearing, said that the chairman gave as the reason for refusing to postpone the hearing that "the inconvenience to the respondent is not a sufficient reason". The respondent contended that that contained an inadequate statement of reasons. An order involving a simple matter such as listing was not a decision requiring extended or summary reasons. The chairman had given a reason, aptly summarised as rejecting inconvenience to the respondent as a sufficient ground. In a case where both parties were represented and had put in written submissions on an interim application, one could infer by the rejection of one party's view that the successful party's view had been upheld. The respondent's second argument was that the chairman did not consider the overriding objective in regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. It was not necessary for every order and every decision in the employment tribunal to cite regulation 10, and the balancing factors set out in the chairman's order indicated that he had the overriding objective fully in mind, for it was said: "A chairman of tribunal has considered carefully what you say and has balanced that against the desirability of bringing this case to a hearing without delay." That was a straightforward recognition of the duty of an employment tribunal to pay attention to the overriding objective. Turning to the preliminary point on privilege, *Independent Research Services Ltd v Catterall* [1993] ICR 1, 5, indicated that where an issue arose as to without prejudice material it ought to be dealt with by a body that was not going to deal with the ultimate adjudication. An issue such as privilege should properly be taken, if it could, as a preliminary point for the reasons given in that case. That would ensure that there would be no contamination of a subsequent tribunal by its having heard the material. Sometimes the issue arose in a hearing and the judge or tribunal had to deal with it, but when the issue arose in advance it was practicable and desirable to have it considered by a chairman alone or by a tribunal who, if they ruled the material out, would not be called on to decide the substantive issue. The chairman erred in not allocating the privilege claim to a preliminary hearing. Accordingly, the order for there to be a hearing would stand but it would be concerned with whether to strike out the matters relying on what was said to be privileged. Responding to a request for some guidance to parties making interim applications to an employment tribunal, it seemed that, when both parties were anxious to have interim decisions made quickly, any application should be lodged with the tribunal and served on the other side, both as a matter of practicality and as a matter of transparent justice. That would cut down time and comply with the duty of parties to enable the tribunal to carry out the overriding objective. A simple way of achieving that, and a good practice, would be to indicate on the face of a document that it was being copied to others and for copies to be sent.

Jonathan Bailey Associates (UK) Ltd v Shapland; 10 December 2003; EAT/957 & 958/03
EAT: Judge McMullen QC

REMUNERATION

On an employee's reference, pursuant to section 11 of the Employment Rights Act 1996, for a determination of what particulars ought to have been included in his particulars of employment, following a transfer of his employment to the respondent transferee, the employment tribunal held that a share ownership scheme operated by the transferor, whereby sums were deducted from employees' salaries and paid into a trust fund to which the transferor also contributed and from which employees had an option to buy shares at a discount, was not "remuneration" for the purposes of section 1(4)(a) and did not form part of his conditions of employment on transfer.

JUDGE ANSELL, dismissing an appeal by the employee, said that in *Keiller v Lothian, Borders & Angus Co-operative Society Ltd* (unreported) 25 September 2002 the Employment Appeal Tribunal in Scotland held that the employment tribunal had been correct to dismiss an employee's claim for a declaration that benefits under an employer's "sharesave" scheme were to be regarded as remuneration within the terms of section 1 of the 1996 Act. Lord Johnston said: "It is the self-evident starting point in considering what constitutes employees' remuneration in the context of employment that the money in question must stem or flow from the employer." On the facts of that case there was no evidence that the employer made any contribution either to the discounted share price or to the bonus which was added to the moneys paid in by the employee, and the employee in the present case sought to distinguish it on the ground that in his case there was evidence that the employer did make a contribution, albeit indirectly and through the trust fund, to the operation of the scheme. The employers made the point that any payments that could be regarded as profit in the hands of the employee, i e the share discount and the bonus, were made by the trust fund to the particular employee, even though the employer might have made some contribution to the general operation of the fund. The respondent then relied on the definition of remuneration in section 1(4) of the Act, and made the points that paragraph (b) clearly contemplated it was something paid by the employer on a regular basis; that paragraph (k)(ii) also contemplated it as something that was paid by the employer; that paragraph (k)(iii) drew a distinction between remuneration and benefits; and that section 2(4), in requiring particulars falling within section 1(4)(a) to be included in a single document, clearly indicated that Parliament did not contemplate that section 1(4)(a) required an employer to declare the detailed rights and obligations under or in connection with a scheme such as the present since it would not be practicable to provide the relevant particulars in a single document. In terms of case law, the respondent argued that the scheme did not fall within the definition of remuneration in *S & U Stores Ltd v Wilkes* [1974] ICR 645, since it was not a sum which was paid by way of wages or salary, nor was it reimbursement of amounts incurred by an employee which contained a profit element and they argued the scheme was no more than a benefit in kind. The appeal tribunal could find no fault in the employment tribunal's conclusions. There were no regular or periodic sums being paid by the transferor to or for the benefit of this particular employee such as to create a profit in his hands which flowed directly from his employer. Any profit or benefit he received would come from the trust fund, the employer making no direct financial contribution to the employee's particular fund.

Jones v Liberata Life Pensions Investments Ltd; 6 February 2004; EAT/897/03
EAT: Judge Ansell, Mr P Dawson and Mr T Stanworth

REVIEW APPLICATION

An employment tribunal chairman refused to review an order, whereby an employee's originating application had been struck out because of his failure to comply with an interlocutory order to give disclosure and serve a schedule of loss, on the ground that there had been a failure to comply with the order without any explanation for the failure being provided and the application, therefore, had no reasonable prospect of success.

RIMER J, allowing an appeal by the employee, said that there was no basis on which the striking out order could be criticised. An unexplained failure to comply with orders such as those made in the present case was on the face of it unreasonable conduct which might deserve an appropriate sanction, including striking out the application. The tribunal had gone through the procedure specified in rule 4(8) of the Employment Tribunals Rules of Procedure 2001 but had received no response to its second warning letter. On the refusal to review, the employee's submission was that his request to review the striking out order was in substance a request to be given the opportunity of arguing that he should be relieved from the sanction imposed by that order; and that, in dealing with that request, the chairman should therefore have had regard to the considerations set out in paragraphs (a) to (i) of CPR, r 3.9. It was said that the chairman had focused on merely one of those factors, which she had regarded as by itself fatal to any hope of success on a review, and there was no basis for a conclusion that she also took into account, in particular, the matters referred to in paragraphs (a), (g), (h) and (i). The employee's submission depended on the proposition that the chairman ought to have had regard to the r 3.9 factors as material to the exercise she was performing. It was said that, although that rule was not expressly incorporated into the 2001 Rules, the tribunal's duty to have regard to the overriding objective in regulation 10 necessarily required it to treat the approach identified in r 3.9 as analogously applicable to the way an employment tribunal should approach a like question. In principle, it was correct that, in dealing with the application before her, the chairman ought to have had regard to the r 3.9 factors. She should have asked herself whether, taking them all into account, the employee had a reasonable prospect of persuading the tribunal on an inter partes hearing that he should be relieved from the finality of the striking out order. That conclusion was not reached on the basis that r 3.9 was to be regarded as impliedly incorporated into the Rules, which it was not, but assistance was derived from not only *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, but also *National Grid Co plc v Virdee* [1992] IRLR 555. As Judge Peter Clark said in *Goldman Sachs*, at p 1256, employment tribunals had now to exercise their powers under the Rules in accordance with the same principles that applied under the CPR. Accordingly, the chairman had misdirected herself in the manner in which she disposed of the request for a review. She had regard, in effect, to just one of the r 3.9 factors; and, though that was a very important one, it did not follow that by itself it was inevitably fatal to the success of a review. Another important consideration was that the employee had provided both the discovery and the loss schedule two days after the striking out order and, if relief were to have been granted promptly, the hearing date could probably still have been kept. The employee could at least be said to have a reasonable, or realistic—meaning better than fanciful—chance of success on a review hearing, and therefore there would be a direction for a hearing by the employment tribunal of his application for a review of the striking out order.

Maresca v Motor Insurance Repair Research Centre; EAT/752/03
EAT: Rimer J (sitting alone); 6 February 2004

WRONGFUL DISMISSAL

An employee, who was summarily dismissed 33 days short of completing the one-year qualifying period for the right to claim unfair dismissal, brought a successful complaint of wrongful dismissal in the employment tribunal. She was awarded damages comprising the pay she would have received during her three-month contractual notice period and, additionally, a sum representing the award she would have received, had she been able to bring a claim for unfair dismissal. The Employment Appeal Tribunal allowed an appeal by the employer against the latter part of the award.

BROOKE LJ, dismissing an appeal by the employee, said that Parliament had expressly legislated to the effect that an employee dismissed without the statutory period of notice attributable to his employment was deemed to have an effective date of termination of employment at the end of the statutory notice period: see now section 97(2) of the Employment Rights Act 1996. The complication in the present case lay in the fact that, whereas the employee's statutory period of notice was only seven days, she had a contractual entitlement to three months' notice. In *Johnson v Unisys Ltd* [2001] ICR 480 the House of Lords held that the existence of a statutory remedy for unfair dismissal precluded the development of a common law obligation on an employer to exercise a power of dismissal in good faith. In the present case the Employment Appeal Tribunal held that that decision precluded them from upholding the employment tribunal's additional award, saying: "Quite simply, the employee is seeking to circumvent the restrictions and limits which Parliament has imposed on compensation for unfair dismissal. That is impermissible." His Lordship could not fault the reasoning of the appeal tribunal. It was not open to the courts, through the machinery of an award of damages for wrongful dismissal, to rewrite Parliament's scheme and to place a financial burden on employers which Parliament had decided not to impose on them. To take any other course would be to expose courts and tribunals to something akin to the chaos which Lord Millett in *Johnson v Unisys Ltd*, para 80, feared. Everyone was now familiar with the statutory scheme for claiming compensation for unfair dismissal. The effective date of termination could generally be identified without too much difficulty, and, provided that it fell at a time when the employee had attained the statutory right not to be unfairly dismissed, then an application could be made to an employment tribunal, subject to the strict time limit. If the employee's submission were well-founded, a wrongfully dismissed employee whose effective date of termination pre-dated the end of their first year of employment would have the benefit of a much longer limitation period in which to make a claim that the dismissal deprived them of the chance of continuing in employment for a longer period and then making a claim for unfair dismissal. In the present case that claim could not be based on the actual facts of the employee's dismissal because by statute she had no right to claim compensation for unfair dismissal in respect of that dismissal. Instead, the court would have to speculate about the chances of her being unfairly dismissed on some hypothetical occasion after her statutory right had accrued. That would be a very unsatisfactory way of proceeding.

CHADWICK LJ delivered a concurring judgment, and SCOTT BAKER LJ agreed.

Virgin Net Ltd v Harper; 10 March 2004; [2004] EWCA Civ 271
CA: Brooke, Chadwick and Scott Baker LJJ

BREACH OF CONTRACT

An employment tribunal held that it had no jurisdiction to consider a respondent employer's counterclaim, for losses incurred as a result of the alleged breach by the applicant employee of the implied term that he would take reasonable care in the performance of his duties during his employment, on the ground that the claim was not outstanding on the termination of the employee's employment as required by article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

JUDGE WILKIE QC, allowing a cross-appeal by the employer, said that the purpose of the 1994 Order was to enable an employment tribunal to deal with both a claim of unfair dismissal and a claim for damages for breach of the same contract of employment. The right for an employee to bring a claim was not subject to any special restriction. By contrast the employer's ability to bring a claim was limited to cases where the employee had already brought a contractual claim pursuant to the Order. In *Hendricks v Lewden Metal Products Ltd* (unreported) 11 March 1996 the Employment Appeal Tribunal said that the words "the claim . . . is outstanding on the termination of the employment of the employee against whom it is made" in article 4(d) of the Order limited claims to those already made but remaining unresolved at the time of the termination of the employment. Were that correct, it would seriously impact on the achievement of the purpose of the Order which was to avoid duality of proceedings. The meaning of "outstanding" could not be limited to claims which had already been made but had not yet been resolved. The normal meaning of "outstanding" was "unresolved, unsettled, unpaid, remaining owing, and/or due". None of those had as a condition that a claim had already been made. The appeal tribunal agreed with the view of the Employment Appeal Tribunal in *Mitie Lindsay Ltd v Lynch* (unreported) 6 October 2003, which endorsed the reasoning in the *IDS Handbook*, p 18: "Despite . . . *Hendricks* there is in fact nothing . . . which states that an employee has to have raised a matter with his or her employer during the currency of the employment in order for it to be classed as outstanding when the employment ends." The employment tribunal had erred in accepting submissions based on *Hendricks* that it did not have jurisdiction to consider the employer's complaints of breach of contract on the ground that no such claim had been made prior to the termination of the employment. The claims remained outstanding at the time of termination and the tribunal did have jurisdiction to entertain them.

Perrie v Mertrux Ltd; 28 January 2004; EAT/736/03
EAT: Judge Wilkie QC, Mr C Edwards and Mr S Yeboah

PRACTICE

At the end of an employee's case of unfair constructive dismissal, the tribunal chairman asked the respondent employer's solicitor whether she intended to make any submissions. She replied that she did not and presented the employer's case. At the conclusion of the hearing the tribunal reserved its decision and ordered written submissions to be exchanged. At the subsequent request of the employee, the tribunal permitted her to submit further submissions in reply to the employer's final submissions and, subsequently, extended the time for so doing. The employee also wrote to the tribunal inviting them to recuse themselves in the light of the question that had been addressed to the employer's solicitor. The tribunal chairman considered that application and refused it on the ground that in the interests of justice and in accordance with the overriding objective there should be finality in concluding the case. The tribunal dismissed the employee's claim.

BURTON J (PRESIDENT), dismissing appeals by the employee at an ex parte preliminary hearing, said that there was no appeal against the substantive decision. The first appeal related to the order for written submissions. The employee had wanted to have the last say. The result had been that the tribunal had varied the direction and, as one would expect by way of the kind of flexibility of case management which tribunals operated, when the employee had asked for time she obtained it and suffered no prejudice. The employee argued that the order was wrong in principle because there was a fundamental right of the person carrying the onus to make their submissions last. It was the case in general terms that when oral submissions were made the person who carried the onus had the last word. But that situation had been overtaken by the more modern system of written submissions, with no stipulation as to the order in which anything was to be read. It was not unusual for there to be a mop-up exercise with final responses or corrections and it was sensible for that to be done by way of exchange. There was no point of principle involved. The second appeal related to the question put to the employer's solicitor. There was only one context for such a question: that the tribunal was of the view that the employee's case was not a strong one and the tribunal was implicitly inquiring whether a submission of no case was to be made. The employment tribunal was entitled, albeit in an exceptional case, to dismiss a case at half-time if an application to that effect was made. It had been emphasised in the Court of Appeal that that was a rare power, and certainly would not be appropriate where the onus did not lie on the party going first. In fact no such application was made in the present case, and no expression of opinion was made by the tribunal.

Cases cited by the employee, which emphasised the importance of the absence of bias, were helpful in indicating a line that could be drawn. The appeal tribunal were entirely satisfied, with the benefit of that guidance, that the present was not a case in which a concluded, pre-judged view was put forward by the tribunal. There was no arguable case of apparent bias. The employee then submitted that the chairman ought not to have taken the decision not to recuse alone. The basis on which the chairman seemed to have taken the view that he could and should make that decision was one of proportionality and cost saving. The right course would have been for the chairman to have consulted the members by telephone, fax or email, so that there could have been an input from them in the making of a decision. The decision was not one the chairman had no jurisdiction to make but was one that ought to have been made by all three members. The appeal tribunal was, however, satisfied that the decision would have been the same if taken by all three together. There was no ground for the tribunal to recuse itself because there was no apparent bias.

Hudson v Testway Housing Ltd; 9 March 2004; EAT/825 & 826/03
EAT: Burton J (President), Dr S R Corby and Mr J Hougham

REPUDIATION

The defendant became the resident porter at a block of flats in 1993, appointed by the then managing agents. The claimant took an assignment of the headlease in March 2002, and, in 2003, gave the defendant a letter of dismissal with four weeks' notice, expiring on 25 March 2003, instead of his statutory entitlement to nine weeks. After 25 March the defendant continued to occupy the flat and perform porterage duties. In December 2003 the underlessees formed a management company to take over the management from 11 April 2004 and proposed to employ and accommodate the defendant. The claimant was granted a possession order in the county court.

MAURICE KAY LJ, allowing an appeal by the defendant, said that the judge held that the claimant had become the defendant's employer when it had taken an assignment of the headlease. It was a fundamental principle of the law of contract that a repudiatory breach did not of itself terminate a contract. It was the acceptance of the repudiatory breach, as such, by the innocent party which brought about termination. That doctrine applied to contracts of personal service as it applied to the generality of contracts. In the real world of employment there was usually no room for debate about whether an employer's repudiation had been accepted by the employee. In most cases it was self-evident, and often a matter about which the employee had no real choice. The defendant submitted that the present was an exceptional case because of the fact that he continued to perform the same tasks after 25 March 2003 as he had been performing before, and, of course, continued to live in the flat. It was apparent that the trial had been conducted on both sides on that assumption. At trial it was the claimant that was asserting that the contract of employment had come to an end on 25 March. Thus, it was for the claimant to prove that its repudiation had been accepted by the defendant. The judge fell into error by failing to approach the case on that basis. To the extent that there was a gap in the evidence, he allowed it to operate against the defendant. While acceptance might be easily inferred in most cases, the evidence in the present case, and the unusual factual matrix, did not support, or at the very least might not have supported, such an inference. It was not obvious that the judge had in fact drawn such an inference. What he seemed to have done, erroneously, was to have held against the defendant a failure to prove that he had not accepted the repudiation. If there was an evidential lacuna about acceptance, it ought to have benefited the defendant rather that the claimant. The order for possession could not stand. Such an order could only be founded on the termination of employment having occurred as the claimant alleged.

JONATHAN PARKER LJ agreed.

Beazer Investments Ltd v Soares; 26 March 2004; [2004] EWCA Civ 482
CA: Jonathan Parker and Maurice Kay LJJ

TRADE UNION ACTIVITIES

An employee was moved from the site where he normally worked to a less congenial site, losing his supervisor status, when the client of his employer at whose site he worked, required the employer to move him, alleging that he had attempted to recruit their staff into the union of which he was a branch secretary. On his complaint under section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992, an employment tribunal found that, although no complaint was, or could be, made of the employee's conduct, his complaint failed because his employer's purpose in moving him was to retain the contract with its client, despite the detriment to the employee, and was not to deter or prevent or penalise him on grounds related to trade union activities.

JUDGE RICHARDSON, dismissing an appeal by the employee, said that the purpose to which section 146(1) referred was the purpose of the employer, and the employment tribunal had rightly concentrated on the employer's purpose. In *Department of Transport v Gallacher* [1994] ICR 967 Neill LJ observed that the crucial issue in that case was the employer's criticism that the tribunal did not distinguish between effect and purpose and emphasised that it was important to adhere strictly to the words of the statute, saying: "in this context 'for the purpose of' connotes an object which the employer desires or seeks to achieve." In the present case the employment tribunal did not fall into error. It expressly found that it was not the employer's purpose to prevent or deter the employee from his union activities but to retain the contract with the client. It found that the employer's purpose was different from that of its client. Even if the effect or consequence of what the employer did was to prevent or deter union activities by the employee, it did not follow that that was its purpose. That conclusion was consistent with section 150, which applied only to a complaint under section 146(1)(c) and which in subsection (3) provided that a tribunal might order compensation to be paid by the person joined (pursuant to subsection (1)) instead of by the employer. The present case illustrated the limits on the protection provided by section 146. It might be thought desirable that a provision along the lines of section 150 should be available to allow the joinder of those who brought pressure on employers, whether or not the pressure related to industrial action. But it was to be observed that the Act placed the burden on the employer to prove the purpose for which he acted or omitted to act, if he had thereby subjected an employee to a detriment: section 148(1). An employer who used third party pressure as a pretext for his own purposes or who worked hand in glove with a third party in order to prevent or deter union membership or activities would find section 148(1) to be an obstacle. An employment tribunal was entitled to scrutinise the true purpose of acts or deliberate omissions which had the effect of preventing or deterring union membership or activities.

Smyth-Britt v Chubb Security Personnel; 21 November 2003; EAT/620/03
EAT: Judge Richardson, Mr P Gammon and Ms P Tatlow

CONSTRUCTIVE DISMISSAL

An employment tribunal dismissed an applicant employee's complaint of unfair constructive dismissal on the ground that, even if there were sufficient breaches of the implied term of trust and confidence for the applicant to be entitled to resign, the act relied on as the "last straw" and which led him to resign was reasonable conduct by the employers.

JUDGE PROPHET, allowing an appeal by the applicant, said that, in situations which involved a series of actions by the employer, it was necessary for the employment tribunal to look at the earlier matters, plus the final act, in order to decide whether cumulatively they constituted a fundamental breach of contract entitling the employee to resign and claim a constructive dismissal. Where the employee was claiming a series of acts culminating in an act alleged to be a final straw, the important case was *Lewis v Motorworld Garages Ltd* [1986] ICR 157. There it was emphasised by the Court of Appeal that, if there was a final act by the employer which caused the employee to resign, it was not essential for that final act itself to constitute a breach of contract. The employment tribunal indicated in their reasons that, because the final act, which caused the applicant to resign, was not a breach of contract, but fully in accordance with the terms of his contract, there could be no constructive dismissal. They also added that the action of the employers was a reasonable one. The employers submitted that, in order to constitute a "last straw", the conduct of the employer had to be unreasonable in some way, and that the tribunal had expressly found that the employers' actions in respect of non payment of wages had been reasonable. The difficulty about that argument was that in all "last straw" situations matters turned to some extent on the perception of the employee at the time he felt that he had been treated unreasonably or unfairly by his employer. It was that that caused him to decide to resign, bringing into the picture previous actions by the employer about which he had complained. It would be wrong to say that any possibility of a finding of constructive dismissal in such a situation was negatived if the final action of the employer was subsequently found by the employment tribunal to have been reasonable. The case law indicated that the function of the employment tribunal when faced with a series of actions by the employer was to look at *all* the matters and assess whether cumulatively there had been a fundamental breach of contract by the employer. The appeal tribunal was unable to find the answer to that question in the reasons of the employment tribunal in the present case. It would not be appropriate for the appeal tribunal to substitute a decision on the matter of whether the applicant was or was not constructively dismissed, nor would it be proportionate for the matter to be remitted to a different tribunal. The case would, therefore, be remitted to the same employment tribunal for it to answer the question whether the previous acts of the employers, together with the final act, *cumulatively* constituted a fundamental breach of the applicant's contract of employment. Permission to appeal granted.

Omilaju v Waltham Forest London Borough Council; 31 March 2004; EAT/941/03
EAT: Judge Prophet, Mr J C Shrigley and Mr D Welch

PRACTICE

A doctor brought complaints of direct and indirect race discrimination against, inter alia, three co-operatives, formed to enable doctors to deal with the out of hours requirements of patients, on the ground that the policy adopted by the co-operatives, the membership qualification for which was limited in such a way geographically that it excluded the applicant's practice from membership, had a racially discriminatory effect. The employment tribunal rejected the claims of indirect discrimination and rejected the claim of direct discrimination against two co-operatives but upheld it against a third.

BURTON J (PRESIDENT), allowing an appeal by the co-operative, said that the decision of the employment tribunal was 54 pages long and there were no paragraph numbers. That was the practice of most employment chairmen in Scotland, but not in England. Its significance in relation to a lengthy decision, such as the present, was that, without paragraph numbers, the parties found it far more difficult to identify those parts of the decision in their notice of appeal or skeleton argument to which particular attention was drawn. The appeal tribunal, therefore, asked that in future chairmen enabled the clear perception of their decisions to be carried out by reference to paragraph numbers. The appeal tribunal also urged that there be not the practice, quite frequent in England when using paragraph numbers, of running into massive numbers of sub-paragraphs and sub-sub-paragraphs. That not only led to a lack of understanding of where one had reached in a decision, but also very often to some scrabbling around in lengthy decisions to discover of what paragraph some sub-sub-paragraph formed part. Chairmen were, therefore, urged to adopt consecutive paragraph numbering; and where it was helpful if particular paragraphs were broken up into sub-paragraphs, which should not happen on any kind of protracted basis, they should be enumerated by using the numbering 12.1, 12.2, etc for the duration of the relevant paragraph. The nub of the case itself was that in relation to the policy of the appellant co-operative of limiting the geographical ambit of the co-operative and excluding the applicant's practice there was direct discrimination, because the explanations given by the co-operative for that basis of exclusion was unjustifiable: not because it was indirectly discriminatory but because it was directly discriminatory. The tribunal did not recite the explanations which were in fact given in some detail by the co-operative. Whether or not they were good, if they were to be rejected by the tribunal because they were not a sufficient explanation for the exclusion of the applicant's practice, there was required to be such a finding by the tribunal. But the tribunal did not explain why it rejected the reasoning of the co-operative; and, even apart from the inadequacy of its dealing with that issue, the tribunal certainly did not deal with the consequence of that conclusion and why it came to the view that the only available inference was that the reason why the co-operative rejected the approaches of the particular practice was on racial grounds. The tribunal erred in law in its approach and the decision could not stand. The matter would be remitted to a different employment tribunal for the issue of race discrimination to be reheard.

Kirkcaldy Out of Hours GP Co-operative v Goyal; 27 April 2004; EATS/83/03
EAT(Sc): Burton J (President), Miss S B Ayre and Miss A Martin

REDUNDANCY

On 29 July 2002 an employee entered into a four-week trial period in another job when his existing position became redundant. Before the expiry of the trial period he wrote a letter to the employers saying that the new position did not suit him and that he wished to apply for redundancy, as a result of which the employers met with the employee and there was an agreement to extend the trial period. Within the extended trial period, but outside the original four-week period, the employee wrote a further letter saying that he would be leaving on 31 October 2002. An employment tribunal found that the employee's first letter was intended to terminate his new employment and that he was entitled to a redundancy payment.

BURTON J (PRESIDENT), allowing an appeal by the employers, said that it was clear from section 138 of the Employment Rights Act 1996 that an employee who did not in fact leave on becoming redundant was only entitled to qualify for a redundancy payment by way of a statutory extension to his entitlement if he either terminated the contract during the trial period or gave notice to terminate during that period and the contract terminated as a consequence of that notice. The only circumstance in which the trial period of four weeks could be extended was where an extension was agreed for the purpose of retraining the employee in accordance with section 138(6), and in the present case there had been no extension of the trial period by virtue of that subsection. The issue on the appeal was whether as a matter of law the employment tribunal had been entitled to construe the employee's first letter as bringing him within the provisions of section 138(2)(b)(i). The tribunal did not refer to either *Morton Sundour Fabrics Ltd v Shaw* (1966) 2 ITR 84 (in the Divisional Court) or *Burton Group Ltd v Smith* [1977] IRLR 351 (in the Employment Appeal Tribunal), both of which were binding on them. *Morton Sundour* was authority for the proposition that in order to determine a contract of employment an employer had to specify when the termination was to occur, or at least to make it possible for that to be ascertained; and that was followed and adopted in the *Burton Group* case. Both cases concentrated on dicta emphasising that a notice by an employer could not be effective without a termination date. The same clearly applied to a notice to terminate given by an employee. If it were the case that a letter such as the present employee's first letter, which clearly expressed a wish to apply for redundancy, was a notice to terminate, the consequence would be extremely detrimental to the interests of many employees who might send such letters, expressing an interest in a redundancy scheme but not intending in any way to resign, since it would give the employer the opportunity to accept as a resignation letter something that was nothing of the kind. It was quire plain that, absent some special argument, the employee's letter was not a notice to terminate and should not have been so construed. It was argued for the employee that section 138(2)(b)(i) should be construed in a way different from the law of ordinary contract, and that the words "gives notice to terminate" should be read more broadly so as to include "gives notice of an intention to terminate at some stage in the future". The appeal tribunal were wholly unpersuaded that section 138(2)(b)(i) should be construed in that way. Section 138 allowed for a very limited extension of the right to a redundancy payment which otherwise accrued on termination of the original employment. The applicant was not entitled to a statutory redundancy payment.

Reality (White Arrow Express) Ltd v O'Hara; 18 November 2003; EAT/447/03
EAT: Burton J (President), Ms B Switzer and Mr B M Warman

TIME LIMIT

Claims by a trainee solicitor against her employers of sex discrimination and unfair dismissal were settled by a COT3 form signed on 18 April 2002. On 2 May 2002 the employee received from the Law Society a copy of a letter dated 22 March 2002 from the employers to the Law Society informing them that the employee's training contract had been terminated. On 9 July 2002, relying on her solicitor's advice that the three-month period for presenting a complaint ran from 2 May, the employee made a complaint that the writing of the letter of 22 March to the Law Society was an act of victimisation, contrary to the Sex

Discrimination Act 1975, by the employers. An employment tribunal held that the complaint was out of time and refused to extend time under section 76(5) of the Act.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that, in exercising its discretion whether or not to extend time, the employment tribunal had erred in leaving out of account the employee's contention that she had been awaiting notification from the Office for the Supervision of Solicitors as to the outcome of a complaint relating to the termination of her training contract. Generally speaking, waiting for an internal procedure to be exhausted was not sufficient grounds for postponing the filing of a claim; however, in the regulated regime of solicitors' contracts the situation might well be different. Secondly, the tribunal had plainly visited the fault of the employee's solicitor upon her. Although in the Employment Appeal Tribunal a fault by a legal adviser in failing to lodge an appeal in time was not generally grounds for the exercise of discretion to extend time, the position seemed to be different at first instance where different considerations applied. In *Hawkins v Ball* [1996] IRLR 258 Keene J held that a tribunal did not err in paying attention to that factor. A tribunal ought to consider the check list under the Limitation Act, suitably modified for the purposes of an employment tribunal claim, as Smith J did in *British Coal Corpn v Keeble* [1997] IRLR 336, but would not fall into error unless it omitted a significant factor. Where the issue turned on the steps taken by an applicant to obtain and act on legal advice, *Steeds v Peverel Management Services Ltd* [2001] EWCA Civ 419 indicated that wrong advice, or the existence of an implied case against negligent solicitors, ought not defeat an applicant's contention that the claim ought to be heard. Inextricably linked to the taking of advice was the concept that the party was not relying on his or her own or actual or imputed knowledge. A trainee solicitor experienced in employment matters was entitled to entrust litigation to another experienced solicitor and to rely on her advice. The concession that the cause of action arose on 22 March 2002 was not easy to make. The concept of a crystallised right, as understood in *Clarke v Hampshire Electro-Plating Co Ltd* [1992] ICR 312, was not always easy to pin down and a trainee solicitor should not be condemned in an exercise of discretion for getting it wrong (with her solicitor). For those reasons, the employment tribunal erred in its application of the law to the exercise of its discretion when it refused to hear the employee's complaint. The case would be remitted for a hearing on the merits of the employee's victimisation claim.

Chohan v Derby Law Centre; 7 April 2004; EAT/851/03
EAT: Judge McMullen QC, Mrs L Tinsley and Mrs R A Vickers

[2004] ICR Part 10

AMENDMENT

An employee's originating application gave "the type of complaint" as "constructive dismissal" and stated in box 11 that the manager at the care home where he worked had waged a vendetta against him which "included bullying, harassment, two physical assaults, one sexual assault". At the start of the hearing the chairman considered that "the grounds of complaint in box 11 raised a clear claim of sex discrimination" and tried to explain that to the employee, who was appearing in person. The employers' counsel objected to the course of the proceedings and the chairman indicated that the tribunal would hear all the evidence and then decide whether the claim included a claim for sex discrimination. The decision of the employment tribunal was that the employee had been unfairly dismissed, that it was "just and equitable to grant leave to amend the originating application to include a claim of sex discrimination" and that the employers had discriminated against the employee on the ground of his sex.

SILBER J, allowing an appeal by the employers, said that there had clearly been a very serious misunderstanding between the tribunal and those acting for the employers on the crucial issues of whether a claim for discrimination on grounds of sex was being pursued and, if so, its ambit. The chairman was the person responsible for suggesting the amendment and thus it was clearly her duty to ensure that the parties knew both that the suggested claim for sex discrimination was proceeding and the extent and nature of the claim. In consequence, the employers were prejudiced in a number of significant ways because they would have conducted the proceedings very differently if they had understood the case on sex discrimination in the way in which it appeared that the chairman did. It was settled law that a party to any action had not had a fair hearing where he did not understand or could not reasonably be expected to have understood allegations made against him, which was the position in which the employers were placed. The tribunal failed to comply with that obligation and thus failed to give the employers a fair hearing. It followed that the finding of sex discrimination had to be quashed. The appeal tribunal could not over-emphasise the need for any proposed amendment to the IT1 of major importance to be formulated in *writing* so that everybody involved in the case knew and understood the precise ambit of the proposed amendment. Natural justice then required that if the application for the amendment was not then summarily rejected by the tribunal, the opposing parties should be given an opportunity to consider the proposed amendment and to make submissions on it before the tribunal gave its decision. In that decision the tribunal must explain its thought process in reaching its decision, and, although that could be done briefly, as the discretion to grant leave was a judicial discretion, it had to be exercised fairly and justly. The employers contended that, if the finding of sex discrimination had to be quashed, the finding of unfair dismissal had also to be quashed on the basis of the apparent bias of the tribunal. There were, however, a number of reasons which individually or cumulatively led to the conclusion that the "fair-minded observer" would conclude that it was not a case of apparent bias, but a case in which, though the employment tribunal made a number of serious mistakes, it did not do so deliberately or as a result of any form of bias. Thus, the claim for apparent bias failed and the finding of unfair dismissal was upheld. The next question was whether the claim for sex discrimination should be remitted. Significantly, the actual decision to give leave to amend was apparently only given in the tribunal's extended reasons, which explained that the employers were "not prejudiced by the amendment". The appeal tribunal were unable to agree with the employment tribunal's reasoning, which failed to take account of the fact that the employers had reasonable grounds for not appreciating even the broadest outline of the case being brought against them. They were seriously prejudiced in several ways by the retrospective amendment. Because of that unfairness the appeal tribunal would set aside the employment tribunal's decision giving the employee leave to amend to add his claim for sex discrimination. The appeal tribunal while not accepting the employers' submission that the sex discrimination claim was doomed to failure, could not itself give leave to amend for two reasons. First, the employers might not have had a full opportunity to explain the prejudice that they might suffer by having another hearing; that matter could be considered by the employment tribunal. Second, the employee had to formulate his claim for discrimination on grounds of sex in writing so that it could be considered. Accordingly, the employee's application to amend would be remitted for consideration by a different employment tribunal, and that tribunal would have to consider if leave could be granted to pursue a claim for discrimination on grounds of sex when and if such a claim was properly formulated.

Care First Health Care Ltd v McLaren; 21 June 2004; EAT/982/03
EAT: Silber J, Ms V Branney and Mr D Smith

DISCIPLINARY PROCEEDINGS

An employment tribunal upheld a complaint of unfair dismissal by a school bursar on the ground that flaws in the disciplinary proceedings leading to her dismissal were not minor and could not be overlooked, having found that the staff dismissal committee which determined that the bursar should be dismissed had consisted of only two governors when three were required and that, in express contravention of regulation 47(3) of the Education (School Government) (England) Regulations 1999, a member of that committee had presented the committee's case to the dismissal appeal committee to which the bursar appealed and which confirmed her dismissal.

JUDGE WAKEFIELD, dismissing an appeal by the governing body, said that it was argued that the tribunal were wrong in law to conclude that, in presenting the school's case at the hearing of the applicant's internal appeal against the decision to dismiss her, the person who had chaired the staff dismissal committee that had originally dismissed her was acting in contravention of regulation 47(3) of the 1999 Regulations, by reason (inter alia) that Part IV of the Regulations, which contained regulation 47, was designed to regulate only membership and function of the appeal committee, that if the regulations were designed to regulate the conduct of the hearing they would make reference to the hearing not to the committee, and that Part IV of the Regulations was not designed to regulate who appeared before the appeal committee or who should act for any party before that committee. The appeal tribunal did not accept that the employment tribunal had been wrong in interpreting regulation 47(3) as they did. The words "no member of the staff dismissal committee whose decision is subject to appeal shall take part in the proceedings of the dismissal appeal committee" appeared clearly to be much wider than any words appropriate to a prohibition on such a person being a member of the appeal panel itself.

Governing Body of Cardinal Newman Roman Catholic School v Reid; 18 March 2004; EAT/13/04
EAT: Judge Wakefield, Ms K Bilgan and Mr A E R Manners

PRACTICE

An employment tribunal heard evidence in complaints of sex discrimination over a 12-day period, the last day of evidence being the day before Good Friday. At the chairman's request written closing submissions were delivered the day after Easter Monday and oral submissions were made that afternoon, so that pre-arranged days for chambers discussion did not have to be vacated. The tribunal upheld the applicants' complaints.

BURTON J (PRESIDENT), when allowing an appeal by the respondents on the ground that conclusions of the tribunal as to both direct and indirect discrimination could not stand, said that, after a lengthy hearing, where written submissions were then sensibly ordered by the tribunal, the timescale for preparation of the submissions had to be a sensible one. The pressure imposed on counsel in the present case was quite unfair. It was essential that the timescale should provide for the submissions to be provided to the other party in sufficient time *before* the oral submissions for the other party to be able to assimilate them, and thus comment on them. It was equally, if not more, essential that the tribunal had the opportunity to read the submissions, which it had not in the present case. It was understandable that there must have been concern at the possible waste of time in respect of the days set aside for discussion if a longer period had been given for the written submissions. But it would have been apparent for some time prior to the close of the hearing that it would be completed on the twelfth day; and it would therefore at a relatively early stage have been seen that it was inevitable that there would have to be time for written submissions to be delivered and assimilated, and that the aspiration of using the three days for chambers discussion would have to be shelved. If such decision had been taken at a relatively early stage in the evidence it might still have been possible to have found other business for the tribunal. Turning to the issue of whether the present case should be remitted back to the same tribunal, which would be able to make use of its existing knowledge of the case and notes of evidence, the following were relevant factors. (1) Proportionality was always a relevant consideration. The award was for £900,000, and, although a fresh hearing in front of a different tribunal would add considerably to the cost on both sides, sufficient money was at stake for the question of costs not to offend on the ground of proportionality or even be an important factor. The distress and inconvenience of the parties in re-living a hearing had to be weighed up, but were rendered necessary in any event by the decision to set aside the original decision and would not be greatly less by virtue of the extra time taken by a fully, rather than partially, remitted hearing. (2) Passage of time: an appellate tribunal had to be careful not to send a matter back to the same tribunal if there was a real risk that they would have forgotten about the case. In the present case, however, the question of delay and loss of recollection was not a material factor one way or the other. (3) Bias or partiality: it would not be appropriate to send a matter back to the same tribunal where there was a question of bias or the risk of pre-judgment or partiality. (4) Totally flawed decision: it would not ordinarily be appropriate to send the matter back to a tribunal where the first hearing was wholly flawed or had been completely mishandled. (5) Second bite: there had to be a very careful consideration of what Lord Phillips of Worth Matravers MR in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, at para 24, called "a second bite at the cherry". The appellate tribunal would only send the matter back to the same tribunal if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised. (6) Tribunal professionalism: where a tribunal was corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a "totally flawed" decision), then, unless it appeared that the tribunal had so thoroughly committed itself that a rethink appeared impracticable, there could be the presumption that it would go about the tasks set on remission in a professional way, paying careful attention to the guidance given by the appellate tribunal. The appeal tribunal were satisfied that the present was a case that could and should be remitted to the same tribunal. The reality was that there was unfinished business to be done. The tribunal would need to resolve a number of issues in accordance with the present judgment, by reference to evidence previously given and any further evidence to be adduced.

Sinclair Roche & Temperley v Heard; 22 July 2004; EAT/738/03
EAT: Burton J (President), Mr D Bleiman and Mr B M Warman

TIME LIMIT

On a preliminary issue to determine whether an employee, whose employment had commenced on 8 April 2002 and was terminated by a letter posted on 27 March 2003 but not read by the employee until 31 March 2003, had the necessary one-year qualifying period of employment to bring a complaint of unfair dismissal, an employment tribunal held that the employee had been entitled to one week's notice under section 86 of the Employment Rights Act 1996, that the starting point for the computation of that notice was the day after the letter was posted, and that, accordingly, she had not completed one year's employment.

LORD JOHNSTON, allowing an appeal by the employee, said that it was argued by the employee that the period of statutory notice could not run until she was aware that she was being dismissed, which was on 31 March 2003, that she was entitled to seven clear days from that date, taking the position to 7 April 2003, and the one-year qualifying period was established. The appeal tribunal recognised that to peril the effective date of termination on knowledge of the employee being aware of the fact that the employer was terminating their contract might introduce an element of instability, since it put it in the hands of an unscrupulous employee to delay matters by simply not reading or ignoring the letter. Nevertheless there was stability if the matter was periled on the issue of knowledge inasmuch that it was in the hands of the employer to determine how he communicated to his employee his intention to terminate employment. As was pointed out in *McMaster v Manchester Airport plc* [1998] IRLR 112, the safest course was communication verbally even if followed up by a letter. Also, it had to be open generally to argue that if an employee exploited the system, acting in bad faith, he or she could not expect to rely on it. There was no issue of bad faith in the present case. The employment tribunal accepted that the employee read the letter as soon as she received it on returning home. Therefore, the period of seven days' notice did not start to run until 1 April 2003 and the qualifying period was established. With regard to a cross-appeal, 31 March 2003 could not be counted: the statutory entitlement was clearly intended to be seven clear days. The effect of sections 86 and 97 of the Employment Rights Act 1996 was to allow the employee the further four days for which she contended, bringing the qualifying period up to 7 April, which admitted the claim.

O'Brien v Pacitti Jones; 30 June 2004; EATS/25/04
EAT: Lord Johnston, Mr P Pagliari and Mr M G Smith

DEDUCTION FROM WAGES

In two unrelated cases, employment tribunals held that, by virtue of section 14(1)(a) and (5) of the Employment Rights Act 1996, they had no jurisdiction to consider claims by employees, under section 13, that their employers had made unauthorised deductions from their wages. In the first case the tribunal considered that it was not possible to conduct an investigation into whether or not the workers had taken part in industrial action, and in the second case the tribunal concluded that section 14 was concerned with the cause of the deduction not its validity.

BEATSON J, allowing appeals by the employees, said that the proposition that a tribunal was not entitled to refuse to make findings to determine whether it had jurisdiction was well established, and it was common ground that the question whether section 14 of the 1996 Act was engaged went to the jurisdiction of an employment tribunal. It remained to consider which the jurisdictional facts were in section 14(1)(a) and (5). In section 14(1)(a) the jurisdictional fact was that there had been "an overpayment of wages" and in section 14(5) it was that "the worker has taken part in a strike or other industrial action". Only when those facts were established could a tribunal look at the employer's motivation for the deduction, under section 14(1)(a) "the purpose of the deduction" as reimbursement of an overpayment of wages, and under section 14(5) that the deduction was made "on account of the worker's having taken part in that strike or other action". In the case of section 14(5) it did not suffice that a strike or other industrial action had taken place or that the employer considered that the worker who had suffered a deduction from his wages had taken part in the strike or other industrial action. What was crucial to the determination that the tribunal had no jurisdiction was that the worker who had suffered a deduction had taken part in the strike or other industrial action. The statutory purpose behind the provisions now consolidated in the Employment Rights Act 1996 was to see that workers received their wages in full at the time they were due and that employers might not make deductions save in specified circumstances. The carefully circumscribed limits to the jurisdiction of the tribunal in section 14 would be avoided if a tribunal was entitled to determine that it had no jurisdiction without making findings as to the existence of the jurisdictional questions. Where the facts were disputed, to decline jurisdiction without making findings of fact would, in effect, allow a respondent to choose whether the employment tribunal or the county court had jurisdiction by the form of its response to a claim. Where the jurisdictional question was a pure question of law, the tribunal would almost invariably be able to reach a decision on the basis of submissions. Where, however, the jurisdictional question at issue was factual and contested, the tribunal would generally have to have evidence before it on which it could make the necessary finding of fact, and to make that finding. Investigating the jurisdictional facts did not necessarily involve investigating the lawfulness of a deduction and could be considered as a separate question. Section 14(5) could not properly be read as stating that section 13 did not apply "where an employer states that the worker has taken part in a strike or other industrial action". Accordingly, the tribunals fell into error in considering that the determination of the facts which by virtue of section 14(1)(a) and (5) removed the jurisdiction of the employment tribunal would involve them having to consider whether the deductions were lawful in the sense of authorised by the employees' contracts. It followed that they should have found the facts before concluding that they had no jurisdiction: *New Centurian Trust Ltd v Welch* [1990] ICR 383.

Gill v Ford Motor Co Ltd; Wong v BAE Systems Operations Ltd; 16 July 2004; EAT/5/04, EAT/1006/03

EAT: Beatson J, Mr M Clancy and Mr J C Shrigley

TRANSFER OF UNDERTAKING

An employment tribunal held that an applicant had sufficient continuity of employment to bring a complaint of unfair dismissal when his period of service with his previous employer was aggregated with that with the respondent employer, pursuant to section 218 of the Employment Rights Act 1996. The tribunal found that the part of the previous employer's business in which the applicant worked amounted to an undertaking in its own right which was transferred to the respondent.

JUDGE BIRTLES, dismissing the employer's appeal, said that the employer submitted that, in deciding whether there had been a "transfer" within the meaning of section 218(2) of the 1996 Act, the tribunal erred in directing itself as to whether there had been a "transfer of an undertaking" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981, as they were separate and distinct concepts. But the cases relied on did not support that submission, and the employment tribunal had been right in seeking to avoid a conflict between section 218(2) and the 1981 Regulations and in trying to give the same meaning of "transfer" to both. The employer also submitted that the tribunal erred in holding that the 1981 Regulations themselves preserved statutory jurisdictional continuity for the purposes of an unfair dismissal claim. The question to be asked was whether there was anything in English case law relating to the proper interpretation of section 218(2) which militated against using the definition of "transfer" in the

Regulations. In *Celtec Ltd v Astley* [2002] ICR 1289, the Court of Appeal had recently held that, where it had direct effect, the Acquired Rights Directive preserved continuity of employment on a relevant transfer. Though it appeared that that conclusion was reached with the agreement of the parties, rather than after hearing argument, it was consistent with the decisions of the Court of Justice in *Sanchez Hidalgo v Asociacion de Servicios Aser* (Case C-173/96) [2002] ICR 73 and *Collino v Telecom Italia SpA* (Case C-343/98) [2002] ICR 38. Those cases all concerned the preservation of continuity of employment in cases where the transfer was from one state authority to another provided that the transfer was the transfer of an undertaking or part of an undertaking for the purposes of the Directive. The appeal tribunal could see no difference in the case of a TUPE transfer. Those Regulations had to be interpreted consistently with the Directive and the decisions of the Court of Justice on the equivalent provisions of the Directive. There could be no logical difference between the preservation of continuity between state authorities under the Directive and the transfer of private undertakings covered by the Regulations. There was no error of law in the conclusion reached by the employment tribunal.

D36 Ltd v Castro; 16 July 2004; EAT/853/03
EAT: Judge Birtles, Mr D Smith and Ms P Tatlow

VOLUNTARY WORKER

An employment tribunal upheld a complaint by an applicant that he had been unfairly dismissed by the respondent charity; but it dismissed his complaint that the charity had failed to comply with the National Minimum Wage Act 1998 on the ground that his claim for the national minium wage was excluded by section 44(1) because he was a voluntary worker. The applicant, who had been engaged by the charity as a caretaker for its museum, received free accommodation in return for 17 hours' work per week but no wages. In calculating the basic award for unfair dismissal the tribunal found his entitlement to be nine weeks' wages but made no monetary award since he had been permitted to live in his rent-free accommodation for 13 weeks following his dismissal.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was submitted on behalf of the applicant that section 44 of the 1998 Act was headed "Voluntary workers" and was intended to apply to such workers only; that the expression was not defined in the Act; and that it was clear that the applicant was a "worker" but that his employment was not voluntary: therefore, he was not a voluntary worker caught by the section. That submission suffered from an internal inconsistency. Counsel seized on the words "voluntary worker" as meaning a worker who was a volunteer, and then defined a volunteer as a person who assisted a charitable organisation without obligation to do so. However, such a person was not employed under a contract of service, nor engaged under a contract for services because the necessary mutuality of obligation was absent. He was therefore not a worker. On that ground he was excluded from the protection of the Act. The meaning and purpose of section 44 and its heading was pellucidly clear. It concerned workers, as defined in section 53, employed in the voluntary sector, as defined in section 44(1), who did not receive pay but did receive subsistence, expenses or free accommodation in circumstances relevant to the employment. That fitted the applicant's case neatly, as the tribunal found. He was excluded from the Act by virtue of section 44. Turning to the compensation for the applicant's unfair dismissal, it was accepted that in so far as the tribunal purported to set off the 13 weeks' additional free accommodation against his basic award entitlement, they were wrong in law. The real issue, however, given that nil compensation was ordered, was what nine weeks' pay was in the circumstances of the case. The definition of a week's pay was to be found in section 221(2) of the Employment Rights Act 1996 and was the amount which was payable by the employer under the contract. Old cases under the Redundancy Payments Act 1965 indicated that free accommodation was not pay. Further, it was to be noted that benefit in kind was expressly excluded from the definition of "wages" in section 27 of the 1996 Act; and that exclusion was consistent with the appeal tribunal's interpretation of "pay" in section 221(2). The point was made on behalf of the applicant that he had received nothing for the loss of his statutory rights. The obligation on the employment tribunal, under section 123(1), was to make a compensatory award which was just and equitable in all the circumstances. It was clear that the tribunal found that the provision of free accommodation for 13 weeks post dismissal extinguished any loss of employment rights or notional consultation period. That was a permissible finding.

Best v St Austell China Clay Museum Ltd; 11 June 2004; EAT/924/03
EAT: Judge Peter Clark, Ms K Bilgan and Mr S Yeboah

COSTS

On claims by an applicant employee of wrongful dismissal, breach of contract and unauthorised deduction from wages, the only sums recovered by the applicant were those based on the respondent employers' construction of the contract and on their calculations. The employers applied for an order for costs of £28,000, pursuant to rule 14(1) of the Employment Tribunals Rules of Procedure 2001 on the ground that the applicant had acted unreasonably in bringing or conducting the proceedings or that the bringing or conducting of the proceedings was misconceived. The tribunal, while upholding the application on the grounds that the claims of unfair dismissal and breach of contract had had no reasonable prospect of success and were misconceived, that there had been some unreasonable conduct and that it would be just to make an order for costs, made an award of £750, stating: "The tribunal has looked at the quantum in the round, and in this case the appropriate sum is £750."

BURTON J (PRESIDENT), adjourning an appeal by the employers and remitting the matter to the tribunal for further reasons, said that the words of Lord Phillips MR in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409, 2417, reflected the position where, if a costs order was to be made, the respect in which there had been unreasonableness, or one of the other categories of conduct which could lead to a costs order, had first to be identified: "Where the reason for an order as to costs is not obvious, the judge should explain why he or she has made the order. The explanation can usually be brief." Brief was one thing, but the one sentence alone in the entire decision of the tribunal was not even brief, and it formed the fundamental basis of the employers' appeal. It was unfortunate that when the matter came to be sifted at the Employment Appeal Tribunal it was sifted straight through to a full hearing, rather than taking the course explained in *Burns v Royal Mail Group plc* [2004] ICR 1103. It was very often useful where an appeal was based on inadequacy of reasons, or absence of one or more findings, for the matter to be sent back at the earliest stage for such reasons to be given, or such findings to be made, if they could, on the basis of the existing notes of evidence by the tribunal below. The importance of considering the operation of the *Burns* procedure at the sift stage in such a case, rather than waiting for the full hearing, was emphasised. Despite problems of the cost and the fact that the chairman of the employment tribunal was no longer available to sit, the right course was a remission to the same tribunal. The great advantage of the *Burns* route was that, unlike the Court of Appeal and the High Court, the employment tribunal had the power of its own motion to review its decision. Consequently, when the case returned to the tribunal for it to consider what its reasons were for arriving at the sum of £750, so that it could be seen whether its reasons were valid in law, or whether it had any reasons at all, the tribunal would also have the opportunity, if it could not think of any reasons to justify its order, or could not remember its reasons, to review its own order. When the tribunal considered the order for £750, it might do so along the following lines. Was the order a contribution towards the costs? Did it balance the fact that the two claims it found to be misconceived fell to be offset to some extent? Was the £750 an assessment of some part of the costs of the hearing and, if so, on what basis? Was there some doubt as to the total recoverability of the £28,000? In which case, what sum, if any, fell to be deducted? Was there some consideration of the fact that the maximum that could be summarily assessed was £10,000? Was some sum notionally deducted from the costs which otherwise have been awarded, either on the basis of consideration of the means of the applicant (which would be unlawful) or of some other consideration?

Bryant (t/a Bryant Hamilton & Co) v Weir; 21 July 2004; EAT/253/04
EAT: Burton J (President), Mrs C Baelz and Mr D Welch

COSTS

The Employment Appeal Tribunal dismissed an appeal by an applicant trade union, from the refusal by an employment tribunal to make a protective award against the respondent company, on the ground that it was out of time.

BURTON J (PRESIDENT), dismissing an application for costs by the respondent company, said that, though, in the event, the appeal was unarguable, in the circumstances, the appellant had not been acting unreasonably in pursuing the appeal, within the confines of what was an exceptional jurisdiction so far as the award of costs was concerned. In *Coots v John Lewis plc* (unreported) 27 February 2001 it was said that it was not generally the practice of the Employment Appeal Tribunal to award costs in circumstances where the appeal had survived effectively a preliminary stage. If that was then the practice, it was no longer so, and it might well be an impermissible trammel of the power of the appeal tribunal to award costs under rule 34 of the Employment Appeal Tribunal Rules 1993. Inevitably, there was some kind of preliminary process at the appeal tribunal. Every appeal was now sifted by a judge in accordance with the *Practice Direction (Employment Appeal Tribunal: Procedure)* 2002 [2003] ICR 122, para 9: some went straight through and some were the subject matter of a preliminary hearing. When there was a preliminary hearing, there was, depending on the precise order made, an obligation on, or an opportunity for, the respondent to submit why the appeal should not go forward. Where, however, as in a very substantial number of cases, the appeal went straight through to a full hearing, there would have been no opportunity for any such input from the respondent, and there ought not to be any practice that, where a case had gone through the sift, or for that matter an ex parte hearing, costs would only be awarded in exceptional circumstances. It would, however, always be a factor that the case had been sifted, when considering whether an appeal had been unreasonably brought, not least because the Registrar had the power effectively to strike out an appeal under rule 3 of the 1993 Rules, if it appeared that there was no jurisdiction to hear it—and, under proposed new rules, if the appeal had no reasonable prospect of success, though that was not the test at present. Another factor was that, under the present Rules, and unlike in the employment tribunals, there was no provision whereby costs could be awarded if proceedings were misconceived, which was defined as having no reasonable prospect of success. The test in the Employment Appeal Tribunal remained whether the proceedings had been brought or conducted unreasonably. Having weighed the matter in the light of all those points, the appeal tribunal concluded that the present proceedings had not been brought or conducted unreasonably by the appellant, albeit without much hope of any success. Though it was pointed out on behalf of the appellant that no warning shot had been fired by the respondent, it would not be right for there to be some kind of condition before it could be said that a case had been brought unreasonably for there to have been a threat of costs. But it was feasible to put a statement in a respondent's answer to the effect that the appeal was entirely one of fact and the appeal tribunal had no jurisdiction. For the future those who had cases at risk of being found to be brought or continued without reasonable prospect of success would be at risk as to costs and should not feel comforted by the existence of a sift order, or even a preliminary hearing order, entitling them to go ahead.

Iron and Steel Trades Confederation v ASW Ltd; 20 July 2004; EAT/452/04
EAT: Burton J (President), Mr R N Straker and Mrs L Tinsley

EQUAL PAY

Four women employees claimed equality of pay with male employees engaged on equivalent work, who were paid the same hourly rate but received in addition a fixed bonus and an attendance allowance, which was paid so long as they turned up for work even if they did not complete their shift. An employment tribunal held that each applicant was entitled to comparity of pay with the male employee most advantageous to them for the purpose of the bonus element of his pay and, in addition, to a relevant comparator for the purpose of the attendance allowance element of his pay.

MITTING J, allowing an appeal by the employers, said that the employment tribunal had concluded that the bonus payments, being calculated on the number of hours worked, were, in effect, part of the standard rate of pay for basic hours, but that the attendance allowance, which only required the worker to turn up for work, was not calculated on an hourly rate and was the subject of a separate term. The following conclusions could be derived from *Hayward v Cammell Laird Shipbuilders Ltd* [1988] ICR 464. First, the tribunal had to compare a term of the woman's contract with a similar term of the man's contract, if there was one. It was impermissible to consider the whole of the contractual or other benefits which could be categorised as pay. Secondly, "term" meant "a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with a similar provision or part in another contract". Thirdly, the terms of the individual contracts under consideration had to be analysed to discern which of them were separate and distinct terms or parts of the contract, or which of them made comparable provision for the same subject matter. Fourthly, to determine whether or not the provisions of an agreement constituted one or more than one term, it was necessary to examine their content. Fifthly, most contracts of employment contained mutual obligations: on the employee to attend for work, on the employer to make monetary payment in return. Sixthly, the provision for payment in many contracts would include an obligation to pay an hourly wage or monthly salary, but might also include, as in the present case, a fixed uplift, labelled by the parties as a bonus. As the employment tribunal had rightly held, the provision for a fixed uplift was not a separate and distinct term or part of the contract but part of the same term as that for the payment of the hourly rate. The question was how to define that term. It could be precisely defined as: "provision for monetary payment for the performance of the contract by employees during normal working hours." The question then was: what was the status of the attendance allowance? The appeal tribunal's view was that it did relate to the same subject matter as basic hourly pay and the bonus, and that it was an element of a distinct part of the contract and not itself a distinct part. It was part of the monetary payment for performance of the contract. The fact that it could on occasion be paid to a man who left soon after he attended work did not make it any less so, because attendance at work and performance of some work was the obligation in respect of which it, like the basic hourly pay and the bonus, was paid. All monetary payments received by the male comparators for normal working hours should be aggregated and divided by the number of hours in the working week, to give an hourly rate. That hourly rate should be compared with the woman's rate; if it was greater, the woman's hourly rate should be increased to eliminate the difference. The tribunal had erred in deciding that the provision for the attendance allowance was a separate term and not part of a single term.

Redcar and Cleveland Borough Council v Degnan; 27 July 2004; EAT 321/04
EAT: Mitting J, Miss G Mills and Mr P A L Parker

UNFAIR DISMISSAL

An employment tribunal upheld an applicant employee's complaint of unfair dismissal, holding that dismissal was a disproportionate sanction and outside the range of reasonable responses, in circumstances where two other employees also involved in the events which had led to the applicant's dismissal had merely been reprimanded or not disciplined at all.

MITTING J, allowing an appeal by the employers and remitting the matter to the employment tribunal, said that the employment tribunal had not referred to the guidance of the Employment Appeal Tribunal in *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 as to the approach to be taken when comparing action taken against one employee with that taken against a dismissed employee. That approach was considered by the Court of Appeal in *Paul v East Surrey District Health Authority* [1995] IRLR 305, where the court stated that it would be wise for any employment tribunal considering such a situation to follow it. The guidance was: "[counsel] has submitted that an argument by a dismissed employee based upon disparity can only be relevant in limited circumstances. He suggests that, in broad terms, there are only three sets of circumstances in which such an argument may be relevant to a decision . . . Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for dismissal . . . Thirdly, [counsel] concedes that evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. We accept that analysis . . . We should add, however . . . that [employment] tribunals would be wise to scrutinise arguments based upon disparity with particular care . . . there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument." The employment tribunal should have expressly reminded itself of that valuable guidance. Clearly the first and second circumstances did not arise in the present case but the third did. The tribunal did not expressly ask itself whether the other employee's position was truly comparable with that of the applicant. Had it asked itself the question posed in the guidance it would have done so. Because the tribunal had not posed and expressly answered the question, its decision was legally flawed.

Hillcrest Care Ltd v Morrison; 21 July 2004; EAT/299/04
EAT: Mitting J, Mr M Clancy and Mrs A Gallico

COMPENSATION

Following findings of unfair dismissal, an employment tribunal, when assessing compensation in respect of the applicants' loss of pension rights, rejected, without consideration, the approaches suggested by the parties on the ground that neither was suggested in the booklet "Compensation for Loss of Pension Rights Employment Tribunals", 3rd ed (2003) and made an evaluation based on the advice in the booklet.

JUDGE PROPHET, allowing an appeal by the employer, said that the employment tribunal's approach was an error of law. The point about the booklet was that it might assist an employment tribunal when there was little forthcoming from the parties as to how to approach what was recognised to be a difficult area, i e assessing a proper compensation of loss of pension rights. However, there was no duty on an employment tribunal to follow the guidelines in the booklet. In particular, where the parties, or one of them, put forward credible evidence and submissions on the matter, the first duty of the tribunal was to consider that evidence and those submissions in order to ascertain whether a fair and equitable assessment of the loss of pension rights could be worked out on that basis. If it could not, the tribunal had adequately to explain why not. To say, as the present tribunal had, that it rejected the parties' submissions *entirely* on the basis that it was not one suggested in the booklet was an error of law. That justified allowing the appeal in respect of the assessment of the loss of pension rights, and the matter of the appropriate compensation would have to be determined on remission. The employer also appealed against an award for future loss in respect of one applicant which was based on a period of five years. That was not only in excess of that proposed by the employer, it was also in excess of that asked for in the applicant's schedule of loss. Although it was unlikely that an employment tribunal would award in any compensation assessment more than an applicant claimed, it was not necessarily an error of law to do so. There might be particular circumstances, especially perhaps where an applicant was not legally represented, where a tribunal felt that to do justice it was necessary to do so. However, in the present case, where both parties had the benefit of legal representation, it was incumbent on the tribunal, if minded to award *more* than was claimed, to do so only after having given both sides an opportunity of making submissions on the matter. That had not been done, and, accordingly, that matter, too, would have to be redetermined on remission. It could be unwise in some cases for employment tribunals to rely on written submissions proposed and submitted after the end of the hearing. Time allocations were designed to include submissions before the hearing ended. While it was always helpful for submissions to be reduced to writing, the opportunity of presenting those submissions to a tribunal at a hearing gave more opportunity for consideration to be given by each representative to adding additional points or making observations on the other side's submissions.

Port of Tilbury (London) Ltd v Birch; 9 September 2004; EAT/415/04
EAT: Judge Prophet, Mr B V Fitzgerald and Mr B R Gibbs

COSTS

After dismissing complaints of unfair and wrongful dismissal, an employment tribunal made an award of costs against the applicant, under rule 14 of the Employment Tribunals Rules of Procedure 2001, on the ground that he had acted unreasonably in continuing with his unfair dismissal claim after receiving a letter from the respondent employers stating that they would not pursue an application for costs if he withdrew his claim at that stage.

JUDGE PROPHET, allowing an appeal by the applicant, said that it was correct that the appeal tribunal could not lightly interfere with the exercise by an employment tribunal of its judicial discretion in respect of awarding costs. It was also correct that, unlike the civil courts, costs were not usually awarded in respect of employment tribunal cases: see the judgment of Mummery LJ in *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398. The employment tribunal's reasoning made it clear that the tribunal was awarding costs against the applicant for having acted unreasonably in pursuing the proceedings after the respondents had offered not to pursue costs against him if he withdrew his claim within 24 hours. Bearing in mind the nature and contents of the offer, the applicant must be right in saying that a failure to accept it could not in itself constitute unreasonable action in bringing or pursuing the proceedings. Parties frequently made threats of costs applications prior to hearings. Further, unsolicited, reasons provided by the tribunal chairman relating to the award of costs included: "in view of the sums involved and the fact that [by the time of the offer] it should have been abundantly clear to the applicant and his advisers that the contemporary documents did not support his version of events which is likely to be disbelieved, the tribunal was of the unanimous opinion that the applicant had acted unreasonably and that an order for payment of costs . . . was appropriate." The outcome of the unfair dismissal case had ultimately to be decided by the employment tribunal on the basis of hearing all the evidence, the availability of which had not been finalised by the time of the offer; no witness statements had been exchanged by then. What employment tribunals usually needed to consider was whether at the conclusion of the case a party could be said to have had an arguable case in any respect, including, for example, procedural matters, even if ultimately unsuccessful. The reasoning should therefore explain the tribunal's findings on that issue. Although the employment tribunal found against the applicant, they did not accuse him of lying. It frequently happened that employment tribunals found the totality of the evidence from one side preferable to that from the other side, without it triggering a costs order. The reasoning of the employment tribunal did not support a finding that the applicant had acted unreasonably within the terms of rule 14(1).

Lake v Arco Grating (UK) Ltd: 3 November 2004: EAT/511/04
EAT: Judge Prophet, Mr T Haywood and Mr H Singh

COSTS

An applicant's complaint of unfair dismissal was ruled out of time but she was allowed to proceed with a claim of sex discrimination based on the dismissal, though she was not permitted to pursue a case based on alleged earlier incidents nor any post-dismissal matters. Further and better particulars served by the applicant purported to include alleged incidents subsequent to dismissal, and the respondents wrote complaining that the proceedings were being conducted in a misconceived and vexatious manner. After dismissing the complaint of sex discrimination, the employment tribunal ordered the applicant to pay the respondents' costs, to be assessed in the county court, on the grounds that the bringing and conducting of the proceedings had been misconceived and that she had acted unreasonably in conducting them. The tribunal found that the claim had no reasonable prospect of success: that many of the incidents alleged did not happen or not in the way alleged and that there was no discriminatory element to the incidents that had happened, including the dismissal itself. It also held that considerable time was taken up by unnecessary and irrelevant evidence and that late allegations had been pursued, and it was very concerned about one very late allegation of a post-dismissal incident.

BURTON J (PRESIDENT), dismissing an appeal by the applicant, said that the relevant rule was rule 14 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, regulation 2(2) of which provided that "misconceived", which was added as a ground for the first time by the 2001 Regulations, included "having no reasonable prospect of success". The applicant's submission was that costs orders in employment tribunals were exceptional and that in making the costs order against the applicant the tribunal erred in the exercise of its jurisdiction. Reference was made to *Lodwick v Southwark London Borough Council* [2004] ICR 884, para 23, in which Pill LJ said: "Costs are rarely awarded in proceedings before an employment tribunal . . . Costs remain exceptional" and made specific reference to *Gee v Shell (UK) Ltd* [2002] ICR (Recent Points Part 12)—a case where the hearing was before the amendment to the Rules—without expressly saying anything about the effect of the amendment. The employment tribunal in the present case recognised the limitations on its jurisdiction. It did not use the word "exceptional", which, of course, did not appear in the Rules in any event, but it did use the word "rare". Those words did not oust the statutory requirement for the tribunal to be satisfied that one or more grounds for a costs order existed, and at best would go to the exercise of discretion, once grounds were established. The employment tribunal was ordinarily a costs-free jurisdiction and something special or exceptional was required before a costs order would be made, in whole or in part, and even if the necessary requirements of rule 14 were established there would still remain a discretion. Costs orders were "exceptional" because there was a high hurdle to be surmounted before such an order could be considered. Even if the employment tribunal had not used words which showed that it appreciated that a costs order was exceptional or rare, provided it had applied the right test, no error of law arose. The appeal tribunal were entirely unpersuaded that the tribunal's conclusion that the case was misconceived was either perverse or unreasoned. On the alternative ground, the applicant's proposition was that the tribunal had to identify with particularity the causative link between the unreasonable conduct found and the costs ordered and it had failed to do so. The position had now been authoritatively canvassed in *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398, where Mummery LJ said, at para 40: "The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the respondent] to prove that specific unreasonable conduct by [the applicant] caused particular costs to be incurred." and, at para 41: "It is not . . . impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct . . . the unreasonable conduct is a precondition of the exercise of the power to order costs . . ." The history of the present proceedings more than justified the finding by the tribunal.

Salinas v Bear Stearns International Holdings Inc; 21 October 2004; EAT/596/04
EAT: Burton J (President), Mrs J M Matthias and Sir William Morris

PROCEDURE

Following the remission by the Employment Appeal Tribunal of the issue of compensation for future loss, on a complaint of unfair dismissal, for further consideration by the employment tribunal, in the absence of any clear finding as to whether the employee had ever applied for jobs at a similar salary or whether such jobs were not available, the employment tribunal heard further evidence on behalf of the employee and made a finding of future loss based on that evidence.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the jurisdiction of the employment tribunal on a remit was limited to the remit created by the appeal tribunal and that the phraseology used by the appeal tribunal excluded the hearing of further evidence at the subsequent hearing before the employment tribunal. It was, they submitted, inappropriate to allow the employee a second bite at the cherry; if there was no evidence before the initial tribunal on the relevant factor, that should have been the finding. The appeal tribunal recognised that, in making a remit, the phraseology it used had to be construed objectively by the employment tribunal whose jurisdiction in dealing with the matter was limited to that construction. It had no further jurisdiction to hear the case. The word "reconsideration", however, conferred a discretion on the employment tribunal in determining how best to go about the matter remitted. Reconsideration could, therefore, contemplate further evidence. Although it was perfectly legitimate for the employers to point out that, on one view, the employee had failed to make out her case on future loss at the initial hearing, it also had to be said that a loss on the face of it was undoubtedly suffered. The procedure followed by the tribunal was obviously fair and balanced and no complaint was made about the actual finding. The tribunal took a course that was open to it in the circumstances.

Romium Ltd v McMillan; 20 September 2004; EATS/113/03
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

SEX DISCRIMINATION

An applicant complained of sexual harassment, alleging that male colleagues had downloaded pornographic images onto a computer in the room where they all worked. An employment tribunal dismissed the complaint, holding that it was not satisfied that she had been shown the images or that she had made any complaint about others viewing such images in her presence.

JUDGE ANSELL, allowing an appeal by the applicant, said that it was argued on behalf of the applicant that, under section 63A of the Sex Discrimination Act 1975 and the guidelines in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, the tribunal was obliged to find whether there were any prima facie facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employers had committed an act of discrimination. If it so found, then the burden would shift to the employers to disprove the suggestion that had arisen by virtue of the primary facts found. It was contended that the facts plainly could have amounted to discrimination in the form of sexual harassment; that the sort of sexual behaviour of which complaint was made, carried out by male office workers in the presence of a female, whether or not actually directed towards her, clearly had the effect of amounting to an affront to her dignity; and that the facts were so obvious that the tribunal was bound to conclude that, viewed objectively, the behaviour did have that potential. It was submitted that the lack of complaint from the applicant, which was at the core of the employment tribunal's decision, was not a relevant factor in assessing detriment, and reference was made to *Driskel v Peninsular Business Services Ltd* [2000] IRLR 151, para 12. The appeal tribunal accepted those submissions. Viewed objectively, the behaviour complained of, namely that on three occasions male colleagues in the same room were downloading onto a computer pornographic material, clearly had the potential effect of causing an affront to a female employee working in the close environment and, as such, would be regarded as degrading or offensive to an employee as a woman. It was clearly potentially less favourable treatment and a detriment followed from the nature of the behaviour; and there was evidence before the tribunal that the applicant had found the behaviour unacceptable. The fact that she did not complain at the time did not afford a defence where the behaviour was so obvious. That being the situation arising from the primary facts, the burden then shifted to the employers to show that there was not less favourable treatment, for instance that the applicant was a party to, or enjoyed, what was going on. That had not happened, as the employers had played no part in the proceedings, and it followed that a finding of sexual discrimination would be substituted and the matter remitted for a remedies hearing.

Moonsar v Fiveways Express Transport Ltd; 27 September 2004; EAT/476/04
EAT: Judge Ansell, Mrs L Tinsley and Miss S M Wilson

[2005] ICR Part 4

COMPENSATION

Following the remission by the Employment Appeal Tribunal [2003] ICR 1556 of consideration of the status of an applicant who had gone to work for the respondent pursuant a three-year modern apprenticeship agreement, the employment tribunal found that the applicant had been unfairly dismissed, and that his complaint of breach of contract failed. The tribunal awarded compensation of £2,966, having applied a 50% reduction for contributory fault to a sum which included £2,000 for lost opportunity following completion of the contract.

JUDGE ANSELL, allowing in part an appeal by the employer, said that the employment tribunal had concluded that, while there was a training element in the parties' relationship, it was overwhelmingly that of employer/employee. (The applicant was paid by the respondent, not the college.) The tribunal also found that the applicant was guilty of substantial default in the relationship and that under the terms of the contract including the training element the employer was entitled to terminate the contract in the ordinary way without being bound to conclude the 36 months of the contract. The employer had properly raised the issue of the award for loss of benefits of apprenticeship, arguing that, if the tribunal was satisfied that he was entitled to bring the contract of apprenticeship to an end, why should he be liable for the loss of benefit the applicant could have obtained by qualifying at the end of his apprenticeship. There was merit in that argument, because on the face of it there was perversity in the tribunal finding on the one hand that the employer was entitled to terminate the contract and on the other awarding a sum that effectively arose out of that contract that should have run its full course. The compensation would be reduced by £1,000, and to that extent the appeal succeeded.

Thorpe v Dul; 6 September 2004; EAT/42/04
EAT: Judge Ansell, Ms B Switzer and Mr S Yeboah

COMPENSATION

Following findings of unfair dismissal and disability discrimination, an employment tribunal assessed compensation for the disability discrimination, and awarded £11,813 for earnings lost up to the date of the hearing and £118,818 for a future loss of earnings of eight years and two months, the period until the applicant's retirement date, making a one-off deduction of 2.5% for accelerated payment.

JUDGE RICHARDSON, allowing an appeal by the employers, said that the decision of the Employment Appeal Tribunal in *Kingston upon Hull City Council v Dunnachie (No 3)* [2004] ICR 227 was concerned with the assessment of future loss of earnings following an unfair dismissal, but similar principles applied to the assessment of future loss of earnings following a discriminatory dismissal. In that case the appeal tribunal had been concerned with the question whether the Ogden Tables should generally be used in assessing compensation for unfair dismissal. The tables, devised for use in personal injury cases, for the most part provided a multiplier for loss of earnings to date of retirement that took into account mortality and the accelerated payment of an award of damages. The essential task of the employment tribunal was to place the dismissed employee, as regarded loss of earnings, in the position which he would have been in if he had not been dismissed unfairly or by unlawful discrimination. That involved estimating what the employee would have earned but for the dismissal, taking into account the employee's prospects of remaining in employment, and also what would actually happen, taking into account the employee's prospects of obtaining other employment. The Ogden Tables came into their own if and only if the employment tribunal concluded, after making those estimates, that the employee should be compensated for a period lasting up to an age for which the tables provided a figure. Otherwise the tribunal had to do its own calculations based on its own estimates. In particular it would have to make its own allowance for accelerated payment. In the present case the employment tribunal, in making its one-off allowance of 2.5% for accelerated payment of an award representing a period of eight years two months, appeared to have thought that it was following the practice of the civil courts in personal injury cases. In that respect it was wrong. The amount of allowance for accelerated payment was not fixed; it depended on the extent of the acceleration. In *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] ICR 1000, the Court of Appeal considered a similar mistake and held that an employment tribunal was wrong when it applied a single discount of 5% to take account of accelerated payment on awards covering two and a half years' loss of earnings and ten years' pension loss. The discount rate prescribed for use in personal injury cases was set at 2.5% by the Damages (Personal Injuries) Order 2001, and, though an employment tribunal was not bound by that discount, it was good practice to adopt it. The employment tribunal in the present case, therefore, committed no error of law in taking a 2.5% discount rate, but it was wrong to limit the discount to a single amount. The loss was calculated on the basis that it would accrue in a straight line over more than eight years. The discount for accelerated payment should reflect the fact that the employee would be able to invest the sum and obtain an additional benefit before it was required to meet his loss. For example, the amount required to meet his loss in the eighth year would be available for him to invest for seven years before it was required, and so on. No sophisticated calculation was required, but it was important to reflect the whole period. Equally, to allow 2.5% over the whole period of loss would be too great. Receipt of the whole sum was not accelerated for the whole period. If the loss accrued in a straight line, rateably over the whole period, receipt of the sum was, overall, accelerated for approximately half the period, and the discount rate would apply to the whole sum for approximately half the period. Thus, in the case where the loss accrued rateably over eight years, one would expect a discount of approximately 10%. If further sophistication was required, no doubt the parties would be entitled to refer the tribunal to an appropriate table, but an employment tribunal made no error of law if it set a discount rate on the broad considerations set out above. The employment tribunal had also assumed, without giving reasons, that the applicant's loss should go to retirement. It had failed to consider, or entirely failed to give reasons for its conclusion as to, material relevant to the issues of whether the applicant would have continued in employment with the respondent and if so for how long. The case would be remitted to the same tribunal.

Benchmark Dental Laboratories Group Ltd v Perfitt; 2 November 2004; EAT/304/04
EAT: Judge Richardson, Mr D Evans and Mr I Ezekiel

COMPROMISE AGREEMENT

An employment tribunal held that an agreement, in a standard form used by the employer, whereby the applicant employee had compromised earlier complaints against his employer did not preclude him from pursuing a complaint under section 47B of the Employment Rights Act 1996. Clause 9.1 of the agreement provided: "This agreement is made . . . in full and final settlement of all claims . . . which the employee has or may have against the [employer] . . . arising out of or in connection with his employment, the termination of his employment or otherwise including in particular the following claims . . ."

JUDGE ANSELL, allowing an appeal by the employer, said that the compromise agreement, though containing in clause 9.1 a lengthy list of possible claims which had been compromised, most if not all of which had not been raised by the employee as possible claims, did not include any reference to a claim under section 47B of the 1996 Act which had clearly been raised in previous correspondence between the parties. The applicant had sought to commence proceedings under section 47B alleging detriments suffered before the termination of his employment that he had previously raised in correspondence over the years. The argument centred around the words in section 203(3)(b) of the 1996 Act that [to be valid] the agreement "must relate to the particular proceedings". Did that mean that the particular claim being compromised actually had to be specified within the body of the agreement, or merely raised in proceedings or correspondence prior to the agreement being concluded? The employer argued that in *Lunt v Merseyside TEC Ltd* [1999] ICR 17 the Employment Appeal Tribunal had approved the approach of an employment tribunal in finding that it was not necessary that the compromise agreement specifically mentioned the claims being compromised as long as they had previously been raised and that it was within the scope of the agreement as a matter of construction, i e it related to the proceedings, and that, as in *Lunt*, the general settlement clause was sufficient to compromise the claim under section 47B. On the section 203 issue, the appeal tribunal had no hesitation in agreeing with the employer's submissions and, in particular, were satisfied that *Lunt* could be regarded as authority for the proposition that the words "relate to" simply referred proceedings or claims which had been raised as opposed to the necessity of setting them out within the body of the compromise agreement. As a matter of documentary construction, the appeal tribunal were satisfied that the section 47B claim fell within the scope of the general clause at the commencement of clause 9.1 of the agreement and that the list that followed was, in the words of Diplock LJ (in *C Maurice & Co Ltd v Minister of Labour* [1968] 1 WLR 1337, 1345), "intended to be illustrative and nothing more". Accordingly, the originating application would be struck out on the basis that the complaints therein made under section 47B of the 1996 Act were compromised by the agreement.

University of East London v Hinton; 22 October 2004; EAT/495/04
EAT: Judge Ansell, Mrs C Baelz and Miss G Mills

REVIEW

Following the presentation of an originating application in September 2002, complaining that she had been unfairly dismissed and racially discriminated against, an employee was reinstated by her employer but was again dismissed in March 2003. Solicitors acting on her behalf withdrew her existing claim and lodged a second originating application. An employment tribunal chairman, giving case management directions, recorded that "for the avoidance of doubt" all complaints relating to the 2002 disciplinary procedures were dismissed. The regional chairman, giving further directions, purported to review that direction and allowed the original claim of race discrimination arising out of the first dismissal to proceed to a hearing on the merits.

JUDGE McMULLEN QC, allowing an appeal by the employers, said that whether the first chairman was simply recording her appreciation of events or making a new decision did not matter, for it was undoubtedly a "decision" by the chairman. Certain aspects of it might be described as an interlocutory order which would take it outside the remit of being a decision, but the best view of it was that it recorded a decision. A decision could be reviewed, whereas the mechanism for challenging an order, which could not be reviewed, was to appeal to the Employment Appeal Tribunal or to seek a variation or discharge of the order within the liberty usually given by a set of standard words at the end of the order. Further, the regional chairman had had no power to review the chairman's decision. Though a decision could be reviewed, it could not be reviewed by a chairman sitting alone. For that reason also the instrument would be quashed. Another ground for allowing the appeal was that no reasons had been given for allowing a review to take place out of time. It was plain that effect had been given to the employee's application to withdraw her first complaint following clear legal advice that her claim should be withdrawn and thus dismissed and no additional reasons had been given for that matter to be reopened. It was not in the interests of justice for litigation to continue open-endedly, and the principles of cause of action estoppel (or more accurately "right to complain" estoppel) applied in the employment tribunal.

Safeway Stores Ltd v Royer: 25 August 2004: EAT/520/04
EAT: Judge McMullen QC (sitting alone)

CASE MANAGEMENT

An employment tribunal upheld an employee's complaint of unfair dismissal and ordered compensation for nine months' future loss of earnings, having refused to allow the employer to adduce additional documents (in the form of a 61-page bundle) on the day of the hearing.

JUDGE McMULLEN QC, dismissing an appeal by the employer (who contended that the additional bundle would have shown that the employee's poor record meant that he would have been dismissed at some stage in the future), said that directions had been given to the respondent employer to prepare the documentation needed at the hearing and an order had been made for the provision of a single agreed bundle. The order made by the chairman on behalf of the tribunal was that the documents would be excluded unless they were relevant to an issue, and no explanation was recorded in the chairman's notes as to why the employer thought the documents were relevant. That was ordinary case management. In advance of the hearing orders had, sensibly, been given for the production of documents, which the respondent did not follow. It was open to the tribunal to allow the material, and there was no error in principle in its decision as to the way in which the case was to be managed. But even if there were any valid criticism of the tribunal's decision to exclude the bundle, as a matter of substance the appeal tribunal accepted that any material relevant to the assessment of compensation was before the employment tribunal. The appeal tribunal were grateful to the chairman for producing her extract from her notes so as to inform the tribunal of the reasons for the refusal of the documents. The appeal tribunal saw the decision made by the employment tribunal as normal case management. When such a decision was made after contested submissions, reasons should be given. It would be quite satisfactory for them to be included in reasons, given orally or in writing, for any judgment at the hearing, since it was effectively a judgment on a contested procedural issue.

Environment Plus (UK) Ltd v Parton; 11 November 2004; EAT/458/04
EAT: Judge McMullen QC, Mrs A Gallico and Ms P Tatlow

DELAY

An employment tribunal gave its reserved decision to uphold two employees' complaints of unfair dismissal, on the ground that the procedures adopted by the employer were fundamentally flawed, six months after the hearing. The respondent employer appealed, primarily, on the ground that the delay rendered the decision unsafe.

LORD JOHNSTON, dismissing the appeal, said that, though delay had been identified as a possible relevant factor in determining whether decisions of tribunals were safe, it had to be emphasised that the mere passage of time was not enough itself. There had to be some clear connection with that passage of time and flaws in the decision. The period of six months was to be deprecated as being too long for any employment tribunal to delay its decision but it did not per se immediately grant any relief on appeal. More importantly, if there were concerns by a party disaffected by a decision of a tribunal which had been subjected to delay, those concerns should be ventilated by way of review and not by way of appeal. That position was offered not as a matter of law but of practice. The appeal tribunal was not prepared to entertain appeals with regard to the issue of delay alone, without the employment tribunal having been given, initially, an opportunity to review its position, and that had not happened in the present case. An application for review had been made, but no attempt was made subsequent to the promulgation of the decision to seek a review based on evidential discrepancies or inadequacies. The appeal tribunal wished to emphasise to the profession that it was extremely important to use the review procedure to address what appeared to be understandable grievances relating to the decision of a particular tribunal which could be rectifiable by a review. In the circumstances, the appeal tribunal was not prepared to entertain the arguments advanced on the inadequacies of the evidential conclusions of a tribunal which might be related to delay. On the more fundamental issue put forward, that on the evidence the tribunal should not have concluded that the employees were denied natural justice by not being given adequate notice of the case against them, the most cursory reading of the tribunal's very extensive judgment made it clear that the tribunal reached the clear conclusion that the employer had totally failed, at the necessary stage of the initial disciplinary hearing, to give the employees a clear statement of what allegations of fact they were facing and what the consequences might be. The appeal would be dismissed. The appeal tribunal, however, wished to reiterate that a six-month delay in issuing a determination was not acceptable, except in the most exceptional circumstances. Any decision should be promulgated within three months but if that time limit was not met that did not give an automatic ground of appeal.

Micron Europe Ltd v Inglis; 19 November 2004; EATS/40/04
EAT(Sc): Lord Johnston, Mr P Pagliari and Mrs E Hibberd

EMPLOYMENT TRIBUNAL

An employment tribunal hearing a claim of sex discrimination reviewed the conflicting evidence as to a number of alleged incidents of harassment, but concluded, inter alia, that evidence given by a friend of the applicant that the applicant had complained to her of the harassment she was receiving was hearsay and they could make no finding; that there was a direct conflict in relation to one allegation and they were not able to make any finding as to whether it occurred; and that there was no corroborative evidence in relation to other allegations and for that reason they could make no findings as to them. The tribunal dismissed the complaint.

JUDGE RICHARDSON, allowing an appeal by the applicant and remitting the case to a different tribunal, said that, in a case where there were disputed issues of fact relevant to the question whether there had been unlawful discrimination, the employment tribunal had a duty to resolve the disputes and find the primary facts. It would generally be the duty of a tribunal faced with the decision as to whether a particular event occurred or not to find as a fact whether it occurred. If there was evidence both ways the tribunal *could* decide either way. Generally that was precisely what it should do. There would be rare occasions when the evidence was so finely balanced that the tribunal would be unable to make up its mind. In that rare event the tribunal should say so and the burden of proof would decide the issue. The authority for those propositions was *Morris v London Iron and Steel Co Ltd* [1987] ICR 855, 864. Further, use of a formula expressed in terms of "cannot" and "unable to" might suggest that the tribunal thought there was some legal bar to a particular result. There was no legal bar to a tribunal believing one witness against another. Also, the parties at the end of a case were entitled to know why they had won or lost. The tribunal's approach was inimical to that. It should say whose evidence it did or did not believe and why. If the tribunal was intending to say it found it impossible to make up its mind about the complaints and that it was an exceptional case where it relied on the burden of proof, it should have said so. If it rejected the applicant's evidence wholly or in part and found her allegations untrue it should have said so and given succinct reasons for its conclusions. The strict rules of evidence did not apply to an employment tribunal. Hearsay evidence was admissible. It was, therefore, not a conclusive argument for a tribunal to say that a piece of evidence was hearsay. The value of a piece of hearsay evidence would vary enormously depending on the issues, the other available evidence and all the circumstances. Those were matters of assessment for a tribunal. Likewise there was no legal requirement for corroboration of any kind of evidence. It was, therefore, not a conclusive argument to say that evidence was not corroborated. A tribunal could, of course, say, after assessing the evidence, that it found the evidence of a particular witness so unsatisfactory it was not prepared to act on it unless there was other evidence to support it. The manner in which the tribunal treated the evidence of the applicant's friend was wrong in principle. If it believed her, the applicant was making contemporaneous complaints of sexual harassment, and that was relevant to an assessment of her credibility. Likewise, the tribunal's references to corroboration were unsatisfactory.

Peart v Dixons Store Group Retail Ltd; 10 November 2004; EAT/630/04
EAT: Judge Richardson, Mr D J Jenkins and Mr R N Straker

PRACTICE

An employment tribunal dismissed an employee's claim that he had been subjected to a detriment for making a protected disclosure. He appealed but subsequently instructed his solicitors to withdraw the appeal. Before a sealed order dismissing the appeal had been issued by the Employment Appeal Tribunal the solicitors wrote applying to restore the appeal on the ground that the appellant had been suffering from a "mini-breakdown" when he had instructed them to withdraw his appeal.

BURTON J (PRESIDENT), directing that the appeal be restored, said that *O'Neill v Governors of St Thomas More Roman Catholic School* (unreported) 12 October 1995 showed that, notwithstanding the apparently limited role of rule 33 of the Employment Appeal Tribunal Rules 1993—if *Blockley plc v Millner* [1992] ICR 749 was strictly applied—there was room for the Employment Appeal Tribunal to allow the withdrawal of a withdrawal of an appeal. While reiterating the fact that it required an unusual or exceptional case to permit the revoking of an order dismissing an appeal of a party making a decision on legal advice to withdraw it, the Employment Appeal Tribunal in *O'Neill* concluded that they should allow such a course, on the basis that it satisfied the requirements of justice to reopen the matter. In the present case the appellant's solicitors asserted that although the appellant had legal advice available to him, his state of mind was such that he refused to discuss the matter with his solicitor. In so far as *O'Neill* set a precedent for the revoking of an order that had been sealed, some three months later, the position was a fortiori where the order had not been sealed and the period of time was considerably shorter. Whereas there could be relevance in the Civil Procedure Rules—on r 40.7 of which the respondent relied by analogy—and paragraph 1(9) of the *Practice Direction (Employment Appeal Tribunal: Procedure) 2002* [2003] ICR 122 stated that the appeal tribunal was guided by those Rules where appropriate, they were not of assistance here. On the assumption that the appeal tribunal was dealing with a review of an order, his Lordship concluded that the interests of justice required a review leading to a revocation of the order. Alternatively, if there was no order requiring revocation, because it was not sealed, his Lordship in any event would direct that the appeal be restored. The reasons for so concluding did not relate to any decision whether or not the appellant had been labouring under any physical or mental problems at the time of the withdrawal, but were that, by comparison with *O'Neill*, the appellant acted with greater celerity; the appeal was not withdrawn as a result of receiving legal advice in connection with so doing; no material prejudice would be suffered by the respondent; and the appeal tribunal had, on the sift, before the withdrawal, considered the appeal to be arguable such as to fix a full hearing.

Brain v Corby Borough Council; 10 November 2004; EAT/376/04
EAT: Burton J (President)

TIME LIMIT

A claimant submitted his claim of unfair dismissal electronically on the last day of the three-month time limit for presenting the claim, but when his representative telephoned the tribunal four weeks later she was told that there was no record of it, and the claim was put in shortly thereafter. The employment tribunal found that, while it accepted that the application form had been submitted to the tribunal website, it had not been received, that an application was not "presented" unless it was physically in a readable format before the tribunal, that accordingly the application had not been presented in time, and that it would not be right to extend time.

JUDGE McMULLEN QC, dismissing an appeal by the claimant, said that the claimant had raised a new point in the skeleton argument which relied on wording in the form which said that when one clicked on the "submit" button the completed form would be sent automatically to the appropriate employment tribunal office. While the appeal tribunal was disinclined to allow the point to be raised, as it would require a view of the employment tribunal as to what was reasonable to be believed, a less technical approach could be taken, because that wording should be read in conjunction with a warning at the very front of the form reminding claimants that strict time limits applied and that it was not guaranteed that the tribunal would receive the form on the same day as it was submitted and to consider an alternative method of delivery if the application was time critical. The employment tribunal could not be faulted when it said that "presented" meant that something actually had to be delivered to the employment tribunal whether physically or in electronic form. If it did not arrive for whatever reason, the claim had not been presented. Those who left their applications to the very last minute ran the risk that something would go wrong. There was no error of law in the tribunal's approach. However, the wording of the form could be made more explicit. There was some force in the suggestion that, since the tribunal encouraged electronic communication and no other form should be submitted at the same time, and since it indicated to the claimant that the pressing of the button would ensure that the matter was transmitted to the appropriate office, a receipt could be generated or some other method indicated so that the claimant would know what had happened. In the present case, the form indicated that there was no guarantee that pressing the "submit" button would mean that the form reached the tribunal on the same date and for that reason the appeal was dismissed, but thought could be given to the way in which the tribunal responded to claims submitted electronically.

Mossman v Bray Management Ltd; 20 December 2004; EAT/477/04
EAT: Judge McMullen QC, Mr A Harris and Mrs M V McArthur

TRANSFER OF UNDERTAKING

Employees, whose employment had been transferred in 1995 to the private sector, following a tendering exercise, and then transferred back to the respondent local authority in 2000, and whose terms and conditions had been governed by a national agreement (the White Book) on the transfer in 1995, complained of unlawful deduction from wages, namely, the failure of their private sector employer to implement an increase in the standard hourly rate agreed following a change in the national bargaining arrangements in 1999. The employment tribunal dismissed the complaints.

JUDGE ANSELL, dismissing an appeal by the employees, said that the first issue was whether the terms of the employees' contracts with the employer, as at the date of transfer, allowed for their pay to be governed not only by the terms of the White Book but by the terms of any subsequent collective agreement which might subsequently be adopted. In 1997 the Green Book had replaced both the White Book, which had dealt with manual workers, and the Purple Book, which had covered other staff, and a new national joint council (NJC) created for all local authority employees. New arrangements reduced the working week for full-time staff which automatically led to an increase in the standard hourly rate. Both parties accepted that the old NJC had power to change the terms and conditions of the White Book and those changes became part of the employee's contract. The employees argued that the changes could also include both handing over power to the new NJC and the acceptance of the new Green Book, both of which thereby became part of the contract. The respondent submitted that without a "bridge" from the individual contract permitting the substitution of a new collective bargain for an old one—for example, by saying that the collective bargain would be "as defined from time to time"—there was no requirement that the employer had to adopt future provisions. There was, in the view of the appeal tribunal, no need to consider the background or context in which the new NJC and/or the Green Book came into existence when the contract of employment was itself clear. The contract only made reference to the old NJC as a negotiating body and only made reference to the White Book as the relevant collective bargain, and without any further reference or incorporation no successor body or successor agreement could be held to be part of the contract of employment. The second issue was whether, in any event, private sector contracted out employees were covered by the Green Book, when the implementation agreement, bringing it into operation, provided by clause 4: "Employees within the scope of the Green Book are all employees of local authorities or other authorities of equal status . . ." Though clause 5 provided: "Where contracts of employment incorporate national agreements, references to the . . . former agreements will now be to the new Green Book", it was clearly governed by the scoping provision of clause 4 and there was nothing to expand its scope to include contracted-out employees. The final issue was whether there would be a necessity for a full-time comparator in the same authority in order for the provisions of the Green Book to apply. The tribunal found that the express terms which provided for a pro rata payment of part-time employees to that being received by equivalent full-time employees could not apply since there were no full-time employees employed by the private sector employer at the time. The appeal tribunal could find no fault in the tribunal's conclusions.

Ackinclose v Gateshead Metropolitan Borough Council; 28 October 2004; EAT/87/04
EAT: Judge Ansell, Mr D Evans and Mr M Worthington

COSTS

At a pre-hearing review an employment tribunal struck out a claimant's claim of unfair dismissal on the ground that it had no reasonable prospect of success since he agreed at the hearing that his employment had been transferred from the respondent to another company by application of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The tribunal refused an application by the respondents for costs, holding that, although the claim was misconceived, it had been genuinely brought and was not frivolous and that the claimant had not acted unreasonably in attending to see whether the tribunal would decide whether the application had a reasonable prospect of success, notwithstanding that the respondent had written to the claimant pointing out his claim was misconceived and warning him that it would be seeking costs.

SILBER J, allowing an appeal by the respondents, said that under rule 14 of the Employment Tribunals Rules of Procedure 2001 a tribunal had an obligation to consider making a costs order where the bringing or conducting of the proceedings was misconceived. That was defined as meaning "having no reasonable prospect of success". The tribunal had been obliged to find that the claim against the respondent was "misconceived". Although, in the circumstances, the employment tribunal had an obligation to consider making an order for costs, it was given a discretion whether or not to do so, and the way in which it exercised its discretion could be the subject of an appeal on a matter of law. Statements in *Benyon v Scadden* [1999] IRLR 700 and *Thorpe v Eaton Electricity Ltd* (unreported) 6 December 2004 showed that a party was at fault if he went to a hearing knowing he was bound to lose, with the result that he should be liable for the costs of the opposing party. That raised the issue of what the claimant knew about the weaknesses of his case. The claimant knew he was employed by another company, and the tribunal was wrong to say that he was not unreasonable in attending the hearing "to see whether the tribunal would decide that [his] application had a reasonable prospect of success". Further, it was not a proper answer to a claim for costs that a misconceived application had been "genuinely brought" because the tribunal had to see if the application was thereafter properly *pursued*. There was clearly force in the point that it did not automatically follow that when an application had been found to be misconceived costs should be awarded, particularly where the prospective party was unrepresented, but the stark fact was that the tribunal had failed to take into account two important factors, namely, that the claimant had been warned at a previous directions hearing that his claim might be misconceived and that he accepted his employment had been transferred. Accordingly, the decision to refuse to award costs was flawed and the matter would be remitted for reconsideration.

Npower v Daly; 23 March 2005; EAT/842/04
EAT: Silber J, Mr C Edwards and Mr P A L Parker

FIXED-TERM EMPLOYEE

On claims, in two test cases, by fixed-term employees that they had been less favourably treated than comparable permanent employees in relation to entitlement to a bonus, the employment tribunal held that time began to run for the claims on 13 November 2002, when the conditions for payment of the bonus were finalised, and not, as contended by the employers, in April 2001 when the employers first announced that a bonus of 5% of annual salary would be paid to permanent staff on completion of the integration of two banking operations, and that it was just and equitable to consider the claims notwithstanding that they had been presented outside the three-month time limit.

JUDGE McMULLEN QC, dismissing appeals by the employers, said that the employers submitted that the claims could not succeed because the employers' "act" took place prior to the coming into force of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 on 1 October 2002; that there was a distinction between the act, in 2001, and the consequence, in 2002, not to make a payment; and that time ran from the former. Though the phrase "cause of action" had been widely used for the purposes of employment proceedings, it was time for modernisation and the appropriate adaptation was "right to complain". It appeared to be common ground that where a discriminatory policy, regime or rule was in place the person affected could complain of its very existence. They could also complain when it was specifically applied in their case. The applicants contended that whatever might have been the applicants' right to complain of the existence of a regime, at least from the date of the implementation of the Regulations, that could not exclude them from the right to complain when the rule was given effect, so as to deny them a bonus when it became payable to comparable employees. In every case the essential question was: what was the discriminatory act; and a tribunal should not take a narrow or legalistic view of the terms in which the complaint was couched. The applicants both claimed that the date on which the action complained of occurred was 18 December 2002. The originating applications appeared to have been drafted with union advice, but the same principle applied, at any rate where agreed facts had been presented to the tribunal. Reference was made to the announcement in November 2001 but not to the announcement in November 2002. No point was taken that the applicants had thereby considered that the 2002 statement was merely a repetition of the 2001 statement or that the applicants were bound by their representation as to the date being 18 December 2002, when the bonuses were paid. That was a correct and helpful stance, and the case had to be decided by reference to more than the originating applications. For the purposes of the present case, "the date of the . . . detriment" was the date when the right given by regulation 3(1) was infringed. The tribunal adopted a very simple approach to the employers' case. It said that, since in April 2001 the Regulations were not in effect, and, further, the applicants were not then employed by the employers, a right to complain did not exist. As to the employers' alternative argument that time began to run on the date each applicant was engaged as a fixed-term employee [October 2001 and February 2002], again, what was done, in taking them into employment on less favourable terms, was not unlawful at that time. No authority had been put forward where the discriminatory act occurred at a time when it was not unlawful, but was implemented at a time when it was. It was not necessary to decide that issue, but it was public policy to give a liberal treatment to threshold conditions in discrimination cases. The tribunal's reasons were replete with distinctions between what was enunciated in 2001 and in 2002. It heard evidence from the employers' officers responsible for policy and employment issues and from a full-time union officer. It was clear that the tribunal regarded the 2001 announcement as conditional and insufficiently detailed, and that that in 2002 indicated a very substantial reconsideration by the employers of the scope of application of the bonus, thus triggering the later operative date. It decided that nothing remained to be done prior to the bonus appearing in the bank accounts of eligible employees on 18 December and, therefore, it rejected the applicants' contention that that was the date of detriment. The appeal tribunal also rejected the employers' contention that the detriment constituting the less favourable treatment was not "on the ground that the employee is a fixed-term employee", relying on the historical separation of their staff between permanent and non-permanent, the latter including fixed-term employees and a range of others. Applying the subjective test required by Lord Nicholls of Birkenhead in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1069, para 29, the question was why did the employers decide that the applicants could not receive the bonus. It would be correct to answer by saying that it was because they were members of a group which consisted of fixed-term employees. The fact that other groups were also excluded was not relevant.

Coutts & Co plc v Cure; 17 September 2004; EAT/395/04
EAT: Judge McMullen QC, Mr D Chadwick and Miss G Mills

HEALTH AND SAFETY

An improvement notice served by a Health and Safety inspector under section 21 of the Health and Safety at Work etc Act 1974 alleged that the applicant company had contravened regulation 4(1)(a) of the Manual Handling Regulations 1992 and stated in the schedule that in order to comply with the notice the company should "Provide mechanical aids for use when lifting tyres and wheels on to the tyre changing machine to avoid manual handling" or use "any other equally effective means of complying with the notice". An employment tribunal affirmed the notice, after modifying it by adding the words thereafter: "such as ensuring that adequate training and supervision is in place", stating that it was accepted by the Health and Safety Executive that the direction that the company provide suitable mechanical lifting aids as an alternative to manual handling was not reasonable. The tribunal found that although the Executive was not obliged to set out directions as to measures to remedy breaches, it could have been more specific in acknowledging that a sufficient remedy might be the implementation of proper training and supervision procedures.

EVANS-LOMBE J, allowing an appeal by the company, said that in *Bexley London Borough Council v Gardner Merchant plc* (unreported) 17 March 1993 the Divisional Court, when considering a notice under the Food Safety Act 1990, said: "does the notice enable the recipient to know what is wrong and why it is wrong? The requirement is that the notice should be clear and easily understood." There was no reason why that should not apply equally to notices under the 1974 Act. Any reasonable employer reading the notice together with the accompanying letter would construe it as requiring him to cease manual handling of wheels on to the tyre changing machine and to substitute some sort of mechanical handling device. That the inspector was willing to contemplate, as an alternative remedy, staff training on how manual handling of the wheels should be undertaken could not be read into the schedule or the letter. But it was sufficient to say that to any recipient it would certainly not clearly emerge that such a method of compliance was acceptable. It was submitted by the inspector that the defects in the schedule should not prove fatal to the notice because the statute did not make it compulsory for the notice to contain "directions as to the measures to be taken to remedy any contravention": see section 23(2). But if the relevant statute provided an option to prescribe how the recipient could comply with the notice, and that option was taken, then the specification of how compliance could be effected formed part of the notice and, if confusing, might operate to make it invalid. Once it became apparent to the tribunal that the inspector was not insisting on a mechanical solution to the problem of lifting wheels on to the tyre changing machine, the tribunal should have realised that the notice was fatally flawed and should not have attempted to put matters right by amendment, since it did not properly enable the recipient to know what was wrong, why it was wrong and how the giver of the notice intended that what was wrong should be put right.

BT Fleet Ltd v McKenna: 17 March 2005: [2005] EWHC 387 (Admin)
QBD (Administrative Ct): Evans-Lombe J

TRADE UNION ACTIVITIES

An employment tribunal dismissed a complaint that the claimant's employers were in breach of his right, under section 10 of the Employment Relations Act 1999, to be accompanied at a disciplinary hearing, when they refused him representation at a meeting to discuss a complaint made against him by a fellow employee. It upheld his complaint under section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 that the employers had failed to allow the claimant time off to attend company council meetings in his capacity as a union representative, but it made no award of compensation under section 172 on the ground that he had suffered no loss of wages.

MR COMMISSIONER HOWELL QC, dismissing the claimant's appeal in respect of his first complaint and allowing his appeal against the refusal to award compensation, said that the first issue depended on whether the meeting that took place was a "disciplinary hearing" for the purposes of section 10 of the 1999 Act. By section 13(4) a disciplinary hearing was a hearing that could result in a formal warning, some other action in respect of the worker by his employer, or the confirmation of a warning issued or other action taken. The claimant submitted that there was nothing in section 13(4) that required the sanction to result directly from the hearing itself and that the definition was wide enough to include meetings which could lead to such a result only after some further process or hearing that might be triggered by what happened at the meeting. Whether a discussion or meeting between management and a worker took on the character of a "disciplinary hearing" within the definition depended on the nature of the meeting itself and not on the description the parties happened to attach to it or its possible consequences: cf *London Underground Ltd v Ferenc-Batchelor* [2003] ICR 656. The Employment Appeal Tribunal in that case referred with approval to the provisions of the ACAS Code of Practice on disciplinary and grievance procedures and observed that there was a difference between informal investigative meetings and hearings as part of a disciplinary process. Whether the point of transformation from simple investigation to the initiation of a disciplinary procedure had or had not been reached in any individual meeting that had started out as a preliminary factual inquiry had to be a judgment of fact and degree for the tribunal of fact. The employment tribunal had not fallen into any error of law in determining that the meeting in question remained on the investigatory side of the line. That part of the appeal was therefore dismissed.

In relation to the second issue, the appeal tribunal had been persuaded that the employment tribunal had taken too narrow a view of the scope of its power to award compensation for what it found to be an unreasonable infringement by the employers of the claimant's rights under section 168 of the 1992 Act. Section 172 empowered the tribunal to make an award of compensation in such a case and required it to have regard not only to "any loss sustained by the employee" but also to the employer's default in failing to permit him to take time off. That section 172 *also* required the tribunal to have regard to any loss the employee could show that he had suffered did not mean that some financial loss or other special injury was the only thing to which regard was to be had in assessing compensation, as the tribunal appeared to have assumed. The word "compensation" in context was wide enough to include the concept of a cash reparation to the individual for the fact that a wrong had been done to him, independently of any special consequential loss he could prove that he had suffered. Even in the context of unfair dismissal, "compensation" was used in that perfectly normal and natural sense in section 118 of the Employment Rights Act 1996. The wording of section 172 of the 1992 Act, in particular the reference to "any" loss sustained, showed that the section contemplated that there night be compensation even in the absence of financial loss. Indeed, where, as in the present case, the employee was made to work his rostered shift instead of attending to union duties the absence of financial loss was likely to be the rule rather than the exception. Tribunals could properly consider whether it was just and equitable to make some reasonable and proportionate award by way of reparation for the wrong done by the employer, without infringing the principle that the purpose had to be compensation to the individual, not the imposition of any form of fine on the employer. The amount of such compensation, if any, was left to the good sense and judgment of the tribunal hearing the evidence. Accordingly, that matter would be remitted for consideration.

Skiggs v South West Trains Ltd; 7 March 2005; EAT/763/03
EAT: Mr Commissioner Howell QC, Mrs M V McArthur and Mr D Welch

EQUAL PAY

In the *Preston v Wolverhampton Healthcare NHS Trust* [2004] ICR 993 litigation, two claims for equal pay, by employees who after being engaged as part-time workers later accepted permanent posts, were struck out by an employment tribunal chairman as being out of time.

JUDGE McMULLEN QC, allowing appeals by the claimants on a preliminary hearing, said that on appeal both claimants contended that the concealment provisions in section 2ZA of the Equal Pay Act 1970 applied to their cases, enabling them to bring a claim long after the six-month period in section 2(4) had expired. On its face, each claim raised a complaint that the claimant was either misled by the employer or was led into a reassurance that she did not need to apply to an employment tribunal. One claimant contended that she had been given a statement in accordance with statutory requirements indicating that her period of continuous employment began in October 1989 and that that period would be recognised for conditions of service, such as pensions. A similar representation in writing had been made to the other claimant, and, in addition, a number of other factual representations appeared to have been made. Those matters indicated that a concealment case could be made at least for the purposes of conducting a full hearing before an employment tribunal. Various passages in *Levez v T H Jennings (Harlow Pools) Ltd* (Case C-326/99) [1999] ICR 521 (see paras 11, 27, 31, 32 and 34) indicated that that case was concerned with deliberate misrepresentations. But, it might be reasonably arguable that a claimant should not be shut out if reassurance was given to her that she needed take no further steps in the case, or if a statutory statement, under section 1 of the Employment Rights Act 1996, indicated that she would have continuity of employment for pension purposes. Such a representation to a woman who had not been eligible to include her previous employment for pension purposes, when she became, as she did in 1995, permanently employed, might well constitute a form of representation covered by *Levez*, and thus article 141 EC, requiring disapplication of section 2(4) of the Equal Pay Act 1970. That being so, the case could be allowed to go to a full hearing; however, an alternative course commended itself, which was that, under *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103 and *English v Emery Reimbold & Strick Ltd (Practice Note)* [2001] 1 WLR 2409, the tribunal chairman could be asked to consider points made in the documentation which had not been the subject of a reasoned judgment. For the purposes of a strike-out, it had to be assumed that what the claimant said in her correspondence was capable of being made good at a full hearing. The chairman, having recognised that there were concealment cases, had failed to deal with, and to give a judgment on, whether or not the claimants' cases revealed sufficient material to warrant a full hearing or should be struck-out as not disclosing a concealment case. There might also be issues as to whether or not the Equal Pay Act 1970 (Amendment) Regulations 2003 took effect so as to give the claimants such a right at the relevant time. The most effective way of dealing with the matter would be to adjourn and remit the matter for further reasons by the chairman and, if necessary, to come back to the appeal tribunal. The respondents would have an opportunity to respond afresh. The chairman would decide whether he was content for the matter to be dealt with as a strike-out application on the papers, or whether the case should be heard at a full hearing, with all parties represented.

Thacker v Secretary of State for Education and Skills; 30 March 2005; EAT/39 & 40/05
EAT: Judge McMullen QC

PRACTICE

An employee claimed that he had been constructively dismissed unfairly because his employers had been in fundamental breach of his contract of employment by failing to honour a contractual promise to increase his salary. The employee's case was that such a promise had been made to him by the employers' special operations director at the staff Christmas party, whereas the employers denied that there had been any such conversation. The employment tribunal found that, while there might well have been some casual conversation, in the particular environment, the director would not have entered into any legally binding contractual commitment whatsoever, and it dismissed the claim. Dismissing an appeal by the employee, the Employment Appeal Tribunal rejected the employee's submission, inter alia, that the conduct of the hearing had been unfair because it made the finding as to what had been said, which was neither parties' case and which neither party anticipated, without giving the parties the opportunity to make representations about its legal impact.

SMITH LJ, dismissing an appeal by the employee, said that, as a general proposition, it was right that parties should have the opportunity to be heard on any issue likely to be relevant to the decision. It was highly desirable that, if a tribunal foresaw that it might make a finding of fact which had not been contended for, that possible finding should be raised with the parties during closing submissions. If the tribunal did not realise what its findings of fact were likely to be until after the hearing had finished, it would usually be necessary to give the parties the opportunity to make further submissions, at least in writing, though not necessarily by oral argument. However, the giving of such an opportunity was not an invariable requirement, for two reasons. First, rule 11 of the Employment Tribunals Rules of Procedure 2004 gave the employment tribunal a wide discretion on procedural matters, and that discretion seemed wide enough to encompass a decision as to the appropriate course to take where the present kind of situation arose. Secondly, if the legal effect of the findings of fact that were to be made was obviously and unarguably clear, no injustice would be done if the decision was promulgated without giving that opportunity. Even if an opportunity should have been given and was not, the consequence would not necessarily be that an appellate court would set aside the decision. It would only do so if it concluded that the lower court's application of the law was wrong. The main issue on the appeal was whether the employment tribunal's application of the law to the facts that it found was right. The real point was that the tribunal found that the words uttered did not amount to a contractual promise. It was not suggested that the proposition of law set out by the tribunal was not correct, and the tribunal applied it to the facts it found. The conclusion was the inevitable consequence of the findings of fact.

Judge v Crown Leisure Ltd; 21 April 2005; [2005] EWCA Civ 571
CA: Mummery and Smith LJJ and Sir Martin Nourse

TIME LIMIT

A complaint, primarily alleging disability discrimination against the claimant's employer, was posted, in 2002, on the Friday before the Sunday on which time for its presentation expired. It was received at the employment tribunal on the following Monday and was ruled out of time by the tribunal.

BURTON J (PRESIDENT), dismissing an appeal by the claimant, said that in the Fmployment Appeal Tribunal if a relevant period expired on a Sunday the period for service was extended to the following working day by rule 37(2) of the Employment Appeal Tribunal Rules 1993; and, if that had applied in the employment tribunals, there would have been no issue in the present case. In *Consignia plc v Sealy* [2002] ICR 1193, para 31(4) the Court of Appeal held that if a complaint was sent by first class post, in the ordinary course of post, it would be delivered on the second day after it was posted (excluding Sundays and Bank Holidays, being days when post was not normally delivered); and rule 61 of the Employment Tribunals Rules of Procedure 2004, which came into effect in October 2004, had now put the matter beyond doubt. The claimant sought to challenge *Consignia* by reference to the Court of Appeal decision in *Anderton v Clywd County Council (No 2)* [2002] 1 WLR 3174. What that case did was deal with the position under the CPR, taking a different view of the construction of CPR rule 6.7 from that taken by Brooke LJ in *Consignia*, whose view of the rule was plainly obiter as he was dealing with the Employment Tribunals Rules of Procedure. It was clear, however, that, at best, CPR rule 6.7 was only part of the building blocks for Brooke LJ's very clear guidance to employment tribunals in *Consignia*, which the appeal tribunal was satisfied was both binding and right, while welcoming Brooke LJ's hope, expressed at para 30, that at some stage soon all tribunals should come into line and that the system enshrined in the Employment Appeal Tribunal Rules would be introduced. The appeal consequently failed.

Coldridge v Prison Service; 20 April 2005; EAT/729/04
EAT: Burton J (President), Mr D Chadwick and Mr M Clancy

UNFAIR DISMISSAL

An employment tribunal upheld a claim of unfair dismissal by a claimant managing director who had been dismissed, following a disciplinary hearing, for "gross misconduct" in acquiring a lease of new premises without authority and in failing to follow procedures in respect of cheque signing. The tribunal reached the conclusion that those had not in fact been the reasons for the claimant's dismissal, the real reason being the claimant's failure satisfactorily to inform the chairman, who had already determined to dismiss the claimant, as he had found someone with whom he wanted to replace him. But it found that, in relation to the lease, the claimant had behaved in a foolish and perverse manner and it was just and equitable to reduce any compensatory award by 50%.

MR RECORDER LUBA QC, dismissing an appeal by the employer and a cross-appeal by the claimant, said that the employment tribunal was plainly right to direct itself to the importance of its function in determining what was the reason for dismissal. Where the employer's reason was hotly in contention, as in the present case, the tribunal was entitled to describe the task before it as seeking to identify the "real" reason for the dismissal. For the comprehensive and cogent reasons it gave, the employment tribunal found as a fact that the real reason for dismissal was the underlying resolve of the chairman to be rid of the claimant in order to replace him with someone more to his taste. That, in the tribunal's assessment, was the actual reason for the dismissal. It was true that the tribunal related its assessment of the employer's intention back to the position as it was immediately prior to the discovery of the issue about the lease. In that circumstance, the question for the tribunal was whether the employer's previously unacceptable reason for discharging the claimant had been replaced with a legitimate reason for dismissal. The tribunal was plainly right to ask itself that question. It might well be that in certain cases an employer did resolve to dismiss an employee on specious grounds but was presented, before that opportunity crystallised, with a better or proper ground on which to dismiss. In such cases the question for the tribunal was whether the employer's original intention had been put to one side or overtaken by the opportunity for a legitimate dismissal which had presented itself. It was the employment tribunal that was charged with the responsibility for determining questions of fact of that nature. It was plain it reached a firm conclusion *as a matter of fact* as to the operative reason for dismissal at the time of dismissal. It had not fallen into error in its approach and had asked precisely the right question required by section 98 of the Employment Rights Act 1996. Turning to contribution, the tribunal was faced with a difficult issue: it found that the decision to dismiss was driven by a desire to replace the claimant, but also that the issue of the premises was "a factor in the mind of the employer" and "inextricably linked" to the dismissal by giving the chairman "the excuse he was seeking". The passage in *Robert Whiting Designs Ltd v Lamb* [1978] ICR 89, 92F–H, not only correctly stated the law but was of direct application in the instant case. The appeal tribunal was unable to detect any error in the approach of the employment tribunal and there were no grounds for interfering with its assessment of the contribution at 50%.

BSW Ltd v Brown; 3 May 2005; EAT/835/04
EAT: Mr Recorder Luba QC, Ms J P Drake and Sir Alistair Graham

WAGES

On an employee's claim for unpaid wages, an employment tribunal found that the employee, who had lived in at her employers' hotel, was either working or on call for 132 hours a week, not 36 hours as contended by the employers; and the tribunal made an award for payment for the excess hours at her contractual hourly rate of £4.80, making an allowance for her free accommodation.

JUDGE BIRTLES, dismissing an appeal by the employers and allowing a cross-appeal by the employee in respect of the deduction for accommodation, said that the employment tribunal recorded that the employee's claim was put in two ways: first, that she was not paid, at the contractually agreed rate, for all the hours she worked, or, secondly, that, given all the hours she worked and that she had been paid £9,100 per annum, her hourly pay was below the national minimum wage. Nothing in law prevented the tribunal from approaching the case on either basis, and the tribunal plainly chose to adopt the contractual rather than the national minimum wage approach. In the circumstances it was a permissible option for the tribunal to have regard to cases under the Working Time Regulations 1998 when considering the broad issue of "working time". The tribunal held that when the employee was not actually serving breakfast or dealing with guests she was expected to be in the hotel and was not free to come and go as she chose; that, apart from two hours a day and Mondays, she was on call 24 hours a day; and that that was "working time" within the meaning of the law. The employers' own evidence was that they "needed someone to look after the hotel at night" and that the member of staff had to be "available at night in case there was a problem". The employee could not do as she pleased. She was always on call and could be interrupted at any moment. The appeal would be dismissed. Turning to the cross-appeal, the employment tribunal in fact found that the living-in was a contractual requirement and that the provision of accommodation was not a "perk" but an essential part of the job. On that basis there was no requirement for the employee to give credit for payment for the accommodation. Furthermore, there were no written terms of the contract nor any oral agreement as to any deduction to be made from wages for the use of the room. Having decided the claim on the contractual basis, it was not open to the tribunal to make a deduction for accommodation under the National Minimum Wage Regulations 1999, and the cross-appeal would be allowed.

Vasquez-Guirado v Wigmore; 8 June 2005; EAT/33/05
EAT: Judge Birtles, Mr P R A Jacques and Mrs J M Matthias

COSTS

An employment tribunal upheld complaints of disability discrimination, unfair dismissal and breach of contract by a claimant and awarded compensation of £5,855, but ordered her to pay £10,000 by way of costs to the respondent employer, who had made an offer to settle without admission of liability of £10,000 prior to the hearing and a further offer of £25,000 after evidence had been given.

JUDGE PETER CLARK, dismissing an appeal by the claimant against the award of costs, said that the principles for deciding whether to make a costs order in the employment tribunal included the following. Costs orders in the employment tribunal remained the exception not the rule; however, the question was not whether the case was exceptional but whether the applicant for costs brought the matter within rule 14(1) of the Employment Tribunals Rules of Procedure 2001. Rule 14(1) imposed a two-stage exercise: the tribunal had to ask itself, first, whether the paying party had acted unreasonably; and then, if so, whether to exercise its discretion in favour of awarding costs against that party. Costs were compensatory, not punitive. The rule in *Calderbank v Calderbank* [1976] Fam 93 had no place in the employment jurisdiction. The discretion of the tribunal under rule 14(1) was not limited to those costs that were caused by or attributable to the unreasonable conduct found. Where a party had obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be sought if persisted in, the tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably. Where a costs order was appealed, the prospects of success were substantially reduced by the restriction of the right of appeal to questions of law and the respect paid to the exercise of discretion by the tribunal below. Though there was force in the claimant's submission that she was entitled to seek a declaration as to her rights, regardless of the compensation sought or payable, it was never a condition imposed by her for any settlement of her claims that the employer admitted liability. The employment tribunal considered that the claimant's rejection of the improved offer merely confirmed its view, arrived at after a hearing lasting seven days, that she took an intransigent attitude towards negotiations; and, in the judgment of the appeal tribunal, that was a view that was open to the employment tribunal. It was said that the employment tribunal looked at the £10,000 offer in isolation, as if applying the *Calderbank* principle, and failed to take into account other factors including the fact that the claimant had substantially won on liability, her own attempts to initiate negotiations, her entitlement to pursue a declaration as to her rights and the lack of any warning as to her costs risks from the tribunal. That submission was rejected. The tribunal was not in a position to give any warning as to costs, and it took the view that the claimant had simply failed to address the point which had fatally undermined the principal part of her compensation claim, the claim for lost earnings. It was also argued that the employment tribunal failed to connect the unreasonable conduct found to the size of the award, but, to repeat, there was no causal requirement in the exercise of the tribunal's discretion under rule 14(1); and, in any event, the award of £10,000 costs was plainly proportionate to the employer's overall costs of £55,000 incurred after the first offer. The employment tribunal had correctly applied the two-stage test and reached a permissible finding and exercised its discretion within proper limits.

Power v Panasonic (UK) Ltd; 9 March 2005; EAT/439/04
EAT: Judge Peter Clark, Mr B R Gibbs and Mr P A L Parker

DISCLOSURE

In proceedings where the claimant, one of 218 claiming equal pay in the context of a larger claim, claimed that her post had been rated as equivalent to or higher than her comparators under a job evaluation scheme, an employment tribunal chairman, on her application, ordered disclosure of (1) such documents as existed which set out scorings, rankings and bandings, and (2) such documents as identified what had been agreed and what remained to be agreed, in respect of the study, and, having described the categories of documents, the order continued: "recognising that a sifting and editing process may have to take place. This topic may be raised by the parties at a subsequent hearing, if there is a dispute."

WILKIE J, allowing an appeal by the employers, said that the approach envisaged by the Practice Direction contained an important principle, namely, that in order that disclosure should be as much as, but no more than, was necessary for the effective disposal of litigation, a step-by-step approach was often to be preferred. The issue between the parties, essentially, was whether the job evaluation study was valid, and the essential element of validity was whether the parties had accepted its validity. That necessitated looking at the relevant minutes and, potentially, exchanges of correspondence between the parties to what was said to be a valid job evaluation study in order to identify whether in fact they had agreed or accepted the validity of the study. At that stage, scorings, rankings and bandings were not, at any rate at first blush, material that was necessary in order to decide whether there had been an acceptance of its validity. On that basis, if no other, while the second category of documentation ought properly to be disclosed, the first category ought not. But the problem with the chairman's order went beyond that. It was an order for disclosure of documents which left it to the parties, after disclosure had taken place, to identify documents which ought not to have been disclosed, and then, if they disagreed about that category, to go back to the tribunal to determine whether it ought properly to have been disclosed. That was an upside-down way of approaching the question of disclosure and was contrary to the proper adoption of a step-by-step approach. The proper way of ordering disclosure was to order disclosure of the material which at the present stage appeared to be disclosable, then to permit the party seeking further disclosure to identify why it was, if need be from the documentation already disclosed, that a further specific category of documentation ought to be disclosed. The rather odd way of making the order adopted by the chairman might have been his way of responding to an argument put forward concerning the sensitivity and confidentiality of the scorings, rankings and bandings, which had not, according to the employer, fructified into a valid system of job evaluation. But the form of disclosure adopted was an unlawful exercise by the chairman of his discretion in case management. The proper order for the chairman to have made was for him to have ordered disclosure of such documents that identified what had been agreed and what remained to be agreed in connection with the job evaluation study. It was implicit that, if after disclosure had taken place the claimants wished to mount an argument for specific disclosure of further categories of documents, they might do so before the chairman, but having regard to the step-by-step approach; and it would be sensible of them to produce evidence, or perhaps argument in the form of a skeleton, as to why it was that the disclosure already ordered was insufficient for the purpose of disposing of the issues at the hearing.

South Tyneside Metropolitan Borough Council v Anderson: 23 March 2005; EAT/02/05
EAT: Wilkie J

NEGLIGENCE

A claimant who had worked as a motor fitter for the defendant from 1982, regularly using vibrating tools, brought an action in negligence for injury diagnosed as vibration white finger. The judge found that the defendant should have known of the potential risk of vibration white finger in 1975 on the publication of DD43, a draft for development guide to the evaluation of exposure to vibration, and that measures would have had to have been taken which would have meant that by the time the claimant started work conditions would have been such that he would not have developed vibration white finger.

SMITH LJ, giving the judgment of the court allowing in part an appeal by the defendant, said that publication of BS 6842 in 1987 was of far greater significance for employers than DD43, and an organisation of the size and with the resources of the defendant ought, in compliance with its duty to keep reasonably abreast of developments relevant to the welfare of its employees, to have had knowledge of BS 6842 at or shortly after its publication in 1987. Further, it would have been reasonable to have expected the defendant to have investigated the extent of its fitters' exposure to vibration and to have instituted remedial measures within two years of learning of the potential risk. That investigation would have revealed a significant risk and remedial measures could have been taken. Accordingly, a finding that the defendant was liable in negligence to the claimant from 1989 would be substituted. But that decision should not be taken as a finding of general application to fitters working in the transport industry. The defendant contended that the damages should be reduced to take account of the fact that by 1989 the claimant had already suffered some damage, and reliance was placed on *Allen v British Rail Engineering Ltd* [2001] ICR 942. It was now generally accepted that the development of vibration white finger was dose-related and that all exposure to vibration would make a contribution to the eventual development of symptoms. However, the objective of an award of general damages was not to compensate the claimant for the amount of physical damage suffered but the effect that damage had on him. Also different people had different susceptibility to the effects of vibration. Claimant A with high susceptibility might have developed symptoms after, say, five years in the job and they might have increased in severity over the ensuing years. Claimant B with lower susceptibility might not develop any symptoms until after, say, 15 years' exposure, and by the date of trial they might still be mild. If the judge found the employer liable from a date, say, 10 years after the start of employment, Claimant A should on principle receive only such sum as reflected the deterioration in his condition attributed to the exposure after that date. However, it was not always possible to make an appropriate reduction and, if the material was not available to enable even a broad brush approach, the claimant would receive full damages because the negligence had made a material contribution to his condition. Claimant B could properly argue that he should receive full verdict damages (despite some exposure before the date of negligence) because he would never have developed any symptoms if it had not been for the employer's negligence. The present claimant did not develop any symptoms until 1999, about 17 years after his vibration exposure commenced and 10 years after the date his employer should have taken remedial steps. Even then, his symptoms did not become severe. He was in the position of Claimant B, and there was no evidential basis to justify any reduction of his damages to take account of the latent damage he had suffered before 1989.

Brookes v South Yorkshire Passenger Transport Executive; 28 April 2005
CA: Brooke, Smith and Wall LJJ; [2005] EWCA Civ 452

COMPROMISE AGREEMENT

Very shortly before the hearing of a claim of race and sex discrimination, the parties signed a compromise agreement by which the respondent agreed to pay the claimant a sum in full and final settlement of any claim she might have against the respondent. When the claim came on for hearing as listed, it was dismissed by the employment tribunal on the ground that terms of settlement had been agreed, though the claimant's representative asked for an adjournment so the matter could be settled by ACAS.

JUDGE REID QC, dismissing the claimant's appeal made on the ground, inter alia, that the terms of settlement did not comply with section 77(4A) of the Sex Discrimination Act 1975 and section 72(4A) of the Race Relations Act 1976, said that it was submitted that the employment tribunal was obliged to ensure that any settlement complied with the provisions of those sections and that it had erred in law in dismissing the claim on the basis of the settlement having already been reached when it did not comply with the statutory provisions and could not therefore bind the parties. It was pointed out that the overriding objective was to ensure that parties were put on a similar footing and had a fair hearing. Though it was common ground that the terms of settlement did not comply with section 77 of the 1975 Act and section 72 of the 1976 Act, that did not prevent a tribunal dismissing a claim on the basis that the parties had reached agreement. The tribunal had looked carefully at the claim and at the proposed settlement and was content to allow the claim to be dismissed on that basis. It was to be noted that the claimant had not thought it necessary or appropriate herself to attend the tribunal hearing, and in those circumstances it might well have been that the tribunal would in any event have dismissed the claim. There was nothing in law which required an employment tribunal to ensure that the terms agreed were binding within either the Sex Discrimination Act or the Race Relations Act before it permitted a claim to be dismissed when the parties had reached what was otherwise a contractual agreement. On the basis that there was a settlement, albeit not complying with the two Acts, the tribunal was entitled to reach the conclusion it did and there was no error of law.

Mayo-Deman v University of Greenwich; 15 June 2005; EAT/875/03
EAT: Judge Reid QC, Lord Davies of Coity and Mr M Worthington

CONSTRUCTIVE DISMISSAL

An employee resigned by a letter giving two months' notice and citing as the reason for her resignation the intolerable behaviour by members of the employer's staff culminating in an unsupportive action by a manager on that day. She refused to withdraw her resignation but agreed to extend the notice period by two weeks. She made a complaint of unfair constructive dismissal, and at the hearing the employment tribunal concluded, as a preliminary point, that the employee had affirmed her contract by working two months' notice and agreeing to work two extra weeks; and it dismissed the complaint.

JUDGE PETER CLARK, allowing an appeal by the employee, said that under section 95(1)(c) of the Employment Rights Act 1996 an employee was dismissed by his employer if the employee terminated his contract of employment with or without notice in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct. The legislation had not always allowed for termination by the employee with or without notice. In *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221, 227, Lord Denning MR said that section 3(1)(c) of the Redundancy Payments Act 1965 had not applied in *Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186 because it only applied where the employee terminated his contract without notice, whereas Mr Marriott had terminated with notice. Today Mr Marriott's case would fall under section 95(1)(c). In the authorities cited by the respondent all the employees had left without notice and the question was whether the employee had delayed too long between learning of the employer's repudiatory breach and leaving the employment, because his act of leaving without notice fixed the date on which he accepted the employer's repudiation. Applying the words of section 95(1)(c) to the present case, the employee terminated her contract with notice. There was no suggestion that she had delayed before giving notice. The "last straw" event she relied on occurred on that very day. She did not delay by giving and working contractual notice. The rationale behind the amendment to the definition of constructive dismissal originally found in section 3(1)(c) of the 1965 Act was that contractual notice once given could not be unilaterally withdrawn by the party giving notice. Thus, subject to withdrawal of notice by mutual agreement, the claimant terminated her contract by giving contractual notice. She did so promptly on learning of the employer's alleged repudiatory breach. The agreement to extend the notice period by two weeks did not affect the question of waiver by affirmation. Far from affirming the contract the employee affirmed her earlier acceptance of the alleged repudiation when she made it clear that she would not withdraw her notice. The parties agreed to a two-week extension of the contractual notice given by the claimant; it was always open to contracting parties to extend or abridge notice provided for under the contract. Technically they were varying the term of contract as to notice. But that agreement could not alter the fact that, for the purposes of section 95(1)(c), the claimant had terminated her contract with notice. Any delay for the purpose of finding affirmation amounting to waiver did not begin on that date but ended on that day.

Owens v Wealdon District Council; 22 July 2005; EAT/186/05
EAT: Judge Peter Clark, Dr Fitzgerald and Baroness Prosser

STRIKING OUT

Complaints by two employees for, inter alia, payment of a lodging allowance were listed for hearing on 26 October 2004 and directions given for, inter alia, the exchange of witness statements by 12 October. The respondent served no witness statements until, on Friday 22 October at 5.50 pm, it faxed two short statements to the claimants' union representative. The latter faxed the employment tribunal on 25 October asking for an adjournment, which was refused, and was told that the matter would be dealt with at the hearing. After speaking to the union representative, the respondent's (in-house) solicitor faxed the tribunal, "consenting" to an adjournment, and saying that, to save wasting costs, the respondent would not attend. On 26 October the chairman directed the respondent's solicitor to attend and subsequently struck out the notice of appearance under rule 18(7)(c) and (e) of the Employment Tribunals Rules of Procedure 2004 on the grounds of unreasonable conduct and failure to comply with directions. The tribunal went on to consider the merits of the complaints, which were upheld, but the respondent was not allowed to participate.

JUDGE SEROTA QC, allowing an appeal by the respondent, said that it was clear from the authorities that, save in cases where there had been a breach of an order or rule and where the default could be regarded as being wilful, deliberate or contumelious disobedience of the order of the court, a court or tribunal should not strike out a case by way of punishment but should always ask whether a fair trial could be achieved. In the present case, when the tribunal said that a fair trial could not be achieved "today", it was saying that it would not be possible for the respondent's witnesses and the claimants' witnesses to be heard on that day in view of the relatively limited time available, two hours having been lost and time spent considering a strike out. Also, albeit the conduct of the respondent and its solicitor might be categorised as unreasonable, the tribunal did not categorise it as wilful, deliberate or contumelious. Though it was possible to strike out a notice of appearance for breach of an order, such as the order to serve witness statements, without reference to the possibility that a fair trial might still be had, that was always a relevant consideration in the exercise of the discretion of the employment tribunal; and, in any event, was a matter required to be considered by reason of the overriding objective. Employment tribunals should not be so outraged by what they saw as unreasonable conduct as to punish the party in default in circumstances where other sanctions could be deployed and a fair trial was still possible. The employment tribunal was also required, on whatever basis it made its order, to consider issues of proportionality. Had it done so, it would have concluded that the prejudice to the claimants was minimal, having regard to the fact that the witness statements added little to what was already in the notices of appearance. Where a notice of appearance was struck out, the respondent would not be entitled to participate in the proceedings at all. The tribunal should have recognised that that was a wholly disproportionate sanction and that the matter could have been dealt with by simply denying the respondent the right to call any evidence, leaving them entitled to cross-examine the claimants, put documents to them and make submissions. Accordingly, a rehearing would be directed at which the respondent would be debarred from calling evidence.

Laing O'Rourke Group Services Ltd v Woolf; 6 May 2005; EAT/38/05
EAT: Judge Serota QC, Mr P Gammon and Mr G H Wright

TRANSFER OF UNDERTAKING

An employment tribunal upheld an employee's complaint, against the transferee in a TUPE transfer, that the transferee had failed to provide the transferor with information required by regulation 10(3) of the Transfer of Undertakings (Protection of Employment) Regulations 1981, so as to enable the transferor to carry out its obligations to affected workers under regulation 10(2)(d).

JUDGE McMULLEN QC, allowing an appeal by the respondent transferee, said that the transferee contended that the tribunal had not addressed the central issue in the case, namely the transferee's response that it was not liable to the claimant under the regulations as it was not the claimant's employer. The transferee was correct. There was no individual right to complain by an affected employee, which the claimant was, when a transferee failed to provide the information to a transferor which was envisaged by the combination of regulation 10(2)(d) and regulation 10(3). The proper mechanism for bringing a transferee into proceedings where it was alleged that the transferee had failed to provide information pursuant to regulation 10(3) was by joinder. That was why it was often necessary to constitute proceedings against the transferor and the transferee, or to rely on the transferor to bring in the transferee as a second respondent, but it depended on the claimant issuing proceedings against the transferor at the outset. The claimant had constituted the proceedings solely against the transferee. Thus the central issue for the tribunal ought to have been to resolve the issue raised by the notice of appearance which indicated that the transferee's position was that it was not the proper respondent. The tribunal failed to resolve that issue, which was one going to jurisdiction.

MITIE Group v Mullineaux; 24 February 2005; EAT/708/04
EAT: Judge McMullen QC, Mr J Hougham and Mr P Smith

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